UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STEVE HENLEY, Petitioner-Appellant,

v.

RICKY BELL, Warden, Riverbend Maximum Security Institution, Respondent-Appellee.

No. 03-5891.

Argued: Nov. 28, 2006.
Decided and Filed: May 15, 2007.
Rehearing and Rehearing En Banc
Denied Oct. 17, 2007

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487 F.3d 379

Before: SILER, COOK, and COLE, Circuit Judges.

COOK, J., delivered the opinion of the court, in which SILER, J., joined. COLE, J. (pp. 391-96), delivered a separate opinion concurring in part and dissenting in part.

OPINION

COOK, Circuit Judge.

Petitioner Steve Henley was convicted of two counts of murder and aggravated arson in violation of Tennessee law and was sentenced to death. He filed a petition for habeas corpus that alleged twenty-one

errors in the state-court proceedings. The district court denied the petition, but granted a Certificate of Appealability (COA) as to one issue, and we permitted Henley to expand the COA to include five additional claims. For the reasons set forth below, we affirm the judgment of the district court.

I. Background

The Tennessee Supreme Court found the following facts in Henley's direct appeal, *State v. Henley*, 774 S.W.2d 908, 912 (Tenn.1989):

> In summary the evidence showed that Fred and Edna Stafford lived on Pine Lick Creek Road in Jackson County, just a short distance from the farm, owned by Henley's family, where his grandmother lived. On the day of the Staffords' death Henley had visited his grandmother and obtained some mechanical parts for some work he was doing. Flatt was with him. Earlier in the day they had been driving about, tending to business affairs of Henley's. During that time they had consumed some beer and also had taken some drugs, referred to in the record as Dilaudids. According to Flatt, as they passed the Staffords' residence Henley commented, "there was some people that lived on that road that owed his grandmother or grandfather some money, and they done him wrong, his grandparents wrong years before, and he was going to stop and see about collecting some money off them." Henley let Flatt out of the truck just before he reached his grandmother's house. When he returned five or ten minutes later he had a .22 rifle with him. They stopped fifty or seventy-five yards up the road where Henley loaded some more shells into the rifle. He also filled a plastic jug with gasoline from a five-gallon can he had in the back of the truck. They proceeded on toward the Stafford

residence. When they reached there Mr. and Mrs. Stafford were standing on the left-hand side of the road looking at a small bridge where some construction work had recently been done. Henley stopped the truck, jumped out and told them, "I want your money, if you don't give it to me this man in the truck here, he's going to kill me." He then directed them to go to the house. Mr. Stafford said, "Steve, if you want money or something, I got $80, maybe $100, you can have it." He forced them on to the house at gunpoint and told Flatt to bring the .22 rifle as he followed behind them. When they got within 20 or 30 feet of the house he told Flatt to give him the rifle and go back to the truck and get the plastic jug of gasoline. Flatt did as directed. As he reached the porch he saw Henley begin to shoot. He first shot Mr. Stafford then turned and shot Mrs. Stafford a time or two. While she was laying on the floor moaning and groaning he threw the rifle to Flatt, took out his pistol and shot her again with the pistol. He told Flatt to pour out some of the gas. Flatt endeavored to do as he was told and poured out a small amount. When he could not finish Henley took the container of gas from him and finished pouring it out. He then directed Flatt to light it. When Flatt said he could not he struck the match and as the flames went up they ran to the truck.

The house burned to the ground. The bodies of the Staffords were found in the ashes. All that remained of Mr. Stafford's body was part of the right leg and the trunk area. The body of Mrs. Stafford was similarly burned. It was determined that Mr. Stafford died from a gunshot wound to the chest with the bullet passing through his heart. Mrs. Stafford's death was caused by burns and

inhalation of noxious gases from the fire. It was the opinion of the medical examiner that Mrs. Stafford lived a minute or longer after the fire began.

In 1986, a Tennessee jury convicted Henley of two counts of first-degree murder and one count of aggravated arson. The jury recommended a death sentence. The trial court sentenced Henley to death for each murder and to twenty years imprisonment for the aggravated arson conviction. The Tennessee Supreme Court affirmed Henley's conviction and sentence on direct appeal. Henley filed a state post-conviction petition in 1990, which the trial court denied. The Tennessee Court of Criminal Appeals concluded that Henley did not receive the effective assistance of counsel during the sentencing phase of his trial and vacated his death sentence. The Tennessee Supreme Court reversed, over a two-justice dissent, and affirmed the trial court's denial of Henley's petition. *Henley v. State*, 960 S.W.2d 572 (Tenn.1997). Henley filed a motion to reopen his state post-conviction petition in 1999, and the trial court denied it. The Tennessee Court of Criminal Appeals affirmed this decision.

Henley filed a petition in the district court pursuant to 28 U.S.C. § 2254 in 1998, which alleged twenty-one grounds for relief. The district court denied each claim and dismissed the petition. The district court granted Henley a COA as to whether he procedurally defaulted his claim that his accomplice testified falsely at his trial, but denied him a COA on all other issues. We permitted Henley to expand his COA to include the following five issues: (1) whether women were underrepresented in the selection of the foreperson for Henley's grand jury in violation of his due process rights and his right to a fair cross-section of the community serving on his jury; (2) whether Henley's

counsel rendered ineffective assistance during the sentencing phase of trial; (3) whether the trial court improperly instructed the jury that it had to unanimously find any mitigating factors in sentencing Henley; (4) whether the prosecutor improperly appealed to the jury to "send a message" as a reason for sentencing Henley to death; and (5) whether the prosecutor improperly vouched for the testimony of Henley's accomplice, Terry Flatt.

II. Standard of Review

We review de novo a district court's legal conclusions and mixed questions of law and fact, and we review its factual findings for clear error. *Armstrong v. Morgan*, 372 F.3d 778, 781 (6th Cir.2004); *Lucas v. O'Dea*, 179 F.3d 412, 416 (6th Cir.1999). Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a district court shall not grant a habeas petition with respect to any claim that was adjudicated on the merits in the state courts unless the adjudication resulted in a decision that (1) was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court; or (2) was based on an unreasonable determination of the facts in light of the evidence presented to the state courts. 28 U.S.C. § 2254(d).

Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 412-13, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from the Supreme Court's

decisions but unreasonably applies that principle to the facts of the petitioner's case. *Id.* at 413, 120 S.Ct. 1495.

The court may look to lower courts of appeals' decisions, not as binding precedent, but rather to inform the analysis of Supreme Court holdings to determine whether a legal principle had been clearly established by the Supreme Court. *Hill v. Hofbauer*, 337 F.3d 706, 716 (6th Cir.2003). Finally, the habeas petitioner has the burden of rebutting, by clear and convincing evidence, the presumption that the state court's factual findings were correct. *See* 28 U.S.C. § 2254(e)(1); *McAdoo v. Elo*, 365 F.3d 487, 493-94 (6th Cir.2004); *Warren v. Smith*, 161 F.3d 358, 360-61 (6th Cir.1998).

III. Grand Jury Challenge

Henley claims he is entitled to relief under the Due Process Clause based on the systematic exclusion of women from the position of jury foreperson in Jackson County, Tennessee. He presents evidence that from 1974 to 1994, a woman was never selected to serve as a grand jury foreperson; Henley was indicted in 1985. At this time, the foreperson in Tennessee played an unusually important role because he was selected independently by the judge as a thirteenth member of the grand jury. *See Campbell v. Louisiana*, 523 U.S. 392, 402, 118 S.Ct. 1419, 140 L.Ed.2d 551 (1998). Thus, the selection of the foreperson affected the grand jury's composition. In *Campbell*, the Supreme Court held that defendants have standing to challenge racial discrimination in the composition of the grand jury used to indict them. Although *Campbell* addresses race alone, Henley contends that this rule extends to gender-based claims as well. In order to raise this claim, however, Henley must first show that he may rely on the rule articulated in *Campbell* under the retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288,

109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), which limits a petitioner's ability to obtain relief based on new rules of criminal procedure announced after his conviction became final. Henley raised this claim before the Tennessee Court of Criminal Appeals in his state petition for post-conviction relief, and the court denied it, finding that Henley could not rely on a retroactive application of *Campbell* under *Teague*. AEDPA directs our inquiry to determine whether the Tennessee Court of Criminal Appeals' conclusion was contrary to or an unreasonable application of clearly established federal law; thus, our question is whether the Tennessee court's application of *Teague* was unreasonable. We hold that it was not.

In making its determination, the state court cited favorably our decision in *Coe v. Bell*, 161 F.3d 320 (6th Cir.1998), in which we discussed this issue at some length, concluding that *Campbell*'s rule cannot be traced for purposes of retroactivity to either *Peters v. Kiff*, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972) (plurality opinion), or *Hobby v. United States*, 468 U.S. 339, 104 S.Ct. 3093, 82 L.Ed.2d 260 (1984). Although *Coe* cannot control our disposition because of the strictures of AEDPA, we find its reasoning helpful.[1] For Henley to succeed, he must show that *Hobby* or *Peters* compelled the result in *Campbell* to such a degree that any conclusion to the contrary would be unreasonable. As *Coe* suggests, however, *Campbell*

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[1] Henley's case is distinguishable from *Coe* in that *Coe*'s conviction became final before the Supreme Court issued its decision in *Hobby*; nevertheless, the decision in *Coe* extensively examined the question whether *Hobby* compelled the Court's decision in *Campbell*. Any argument that *Coe* is inapposite because of this distinguishing fact is misplaced as we look to *Coe* only for guidance in determining what law is clearly established. *Hofbauer*, 337 F.3d at 716.

cannot be traced to *Hobby* or *Peters* so clearly. First, although the *Campbell* Court cited *Peters* approvingly in concluding that a defendant can raise a due process challenge to the exclusion of members of another race from a state grand jury, only three Justices in *Peters* based their decision on both the Constitution and a criminal statute they read to provide defendants this entitlement. *Coe*, 161 F.3d at 353 (citing *Peters*, 407 U.S. at 497-98, 92 S.Ct. 2163). The other three Justices in the six-Justice majority concluded that the right stemmed from the statute alone. *Id.* (citing *Peters*, 407 U.S. at 505-07, 511, 92 S.Ct. 2163, and *Campbell*, 523 U.S. at 400-01, 118 S.Ct. 1419). Thus, because " 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds,' *Peters* cannot be said to stand for the proposition that the constitution gave Peters ... the ability to raise a due-process challenge to the exclusion of Blacks (or women) from his grand jury." *Id.* (citing *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977)). We find this reasoning sound, and Henley cannot show the Tennessee appellate court's decision concluding that *Peters* fails to authorize the instant due process challenge is unreasonable or contrary to clearly established federal law.

As for *Hobby*, the *Campbell* court cited *Hobby* approvingly, but *Hobby* cannot be said to have compelled *Campbell*'s result for retroactivity purposes. As *Coe* explained,

> In *Hobby*, a white male defendant challenged his indictment because he said that the grand jury excluded Blacks and women. Because Hobby's claim had been dismissed as a matter of law, the Supreme Court assumed that the violation had occurred and proceeded to consider if Hobby had

> any remedy. The Court began by noting that purposeful exclusion of women and Blacks from grand jury service was unconstitutional, without distinguishing between gender and race. In proceeding next to the question of remedy, therefore, the Court seemed to be assuming implicitly that Hobby had standing to raise his claim, both on gender and racial grounds, though it noted the narrow holding of *Peters*. In the end, the Court decided (for reasons that do not concern us) that Hobby was not entitled to a remedy. The *Campbell* Court read *Hobby* approvingly, as establishing some sort of due-process protection with regard to race (the only issue *Campbell* pursued), though it left the determination of the bounds of that protection, which it said were "still open," for the lower court to determine on remand.
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> We do not doubt that *Hobby* and *Campbell* can be read as extending due-process protection to men challenging the exclusion of women, though neither case provided detail on the extent of that protection. The casual manner in which these cases suggest such an extension does not mean, however, that the holdings followed necessarily from "existing precedent." Indeed, the failure of *Hobby* even to mention the gender/standing question paved the way for conclusions such as the one we reached later in *Ford v. Seabold* [841 F.2d 677 (6th Cir.1988)].

Id. at 354 (citations omitted). *Coe* also noted that Justice Marshall issued a dissenting opinion from the denial of certiorari in *Ford v. Kentucky*, 469 U.S. 984, 985-86, 105 S.Ct. 392, 83 L.Ed.2d 325 (1984), a case decided after *Hobby*, in which he commented that the third-party standing issue was not definitively resolved and that the Court had issued conflicting pronouncements on the issue. *Id.* In sum, *Coe*'s

reasoning convinces us that the Tennessee court's conclusion was neither contrary to nor an unreasonable application of *Teague*. Moreover, as *Coe* noted, when we examined this issue in *Ford v. Seabold* we concluded that a defendant did not "have standing to challenge the composition of the grand jury pool under the due process clause." 841 F.2d 677, 688 (6th Cir.1988). *Seabold* bolsters our conclusion in that it provides a perspective on the state of federal law at a time quite relevant to our determination of this issue: after *Hobby*, but before *Campbell*. See *Hofbauer*, 337 F.3d at 716.

Henley also unpersuasively relies on *Rose v. Mitchell* for the proposition that an "indictment returned by [an] unconstitutionally constituted grand jury [must] be quashed." 443 U.S. 545, 551, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979). *Rose*, however, concerned an African-American defendant challenging the exclusion of African-Americans from the grand jury and relied on the principle that "[a] criminal defendant 'is entitled to require that the State not deliberately and systematically deny to members of *his* race the right to participate as jurors in the administration of justice.' " *Id.* (quoting *Alexander v. Louisiana*, 405 U.S. 625, 628-29, 92 S.Ct. 1221, 31 L.Ed.2d 536 (1972) (emphasis added)). Even if *Rose* reaches gender, Henley, a male, could only challenge the exclusion of other males from the grand jury. Thus, *Rose* does not alter our conclusion on Henley's due process claim.

Henley also raises a Sixth Amendment fair-cross-section challenge to the foreperson of his grand jury. Regardless of the logical soundness of arguing that one person should represent a fair cross-section of a community, the Supreme Court has never allowed defendants to challenge the composition of their grand juries based on the Sixth Amendment. While some

federal courts have permitted a fair-cross-section challenge to a state grand jury, *see, e.g., Murphy v. Johnson*, 205 F.3d 809, 817-19 (5th Cir.2000); *O'Neal v. Delo*, 44 F.3d 655, 662 (8th Cir.1995); *Ramseur v. Beyer*, 983 F.2d 1215, 1236-37 (3d Cir.1992), we may grant Henley relief only if this right was clearly established by the Supreme Court as of 1999, and we hold that it was not.

IV. Ineffective Assistance of Counsel

Henley argues his counsel's failure to investigate his background and to present mitigating evidence at his sentencing hearing deprived him of his constitutional right to effective assistance. Henley can prevail only if the Tennessee Supreme Court's denial of his ineffective-assistance claim was unreasonable in light of clearly established Supreme Court precedent. Our review is essentially limited to determining whether the Tennessee Supreme Court's decision was contrary to or an unreasonable application of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Putting aside questions of counsel's performance, we find nothing unreasonable in the Tennessee Supreme Court's conclusion that Henley was not prejudiced by counsel's alleged errors. Therefore, we reject his ineffective-assistance claim.

Our review of the record confirms that it was not unreasonable for the Tennessee Supreme Court to conclude that no prejudice resulted from counsel's failure to call additional lay witnesses. Henley's grandmother gave a "favorable and detailed description" of Henley. Of course, as the state appellate court pointed out, it is "possible" that the jury might have been hostile toward Henley's grandmother. *Henley v. State*, No. 01 C01-9506-CC-00193, 1996 WL 234075, at * 11 (Tenn.Crim.App. May 9, 1996). But the other lay witnesses likely would not

have painted a better picture in light of "their limited relationship with Henley at the time of the murders" and "their personal knowledge of his drug use at the time of the murders." *See Henley*, 960 S.W.2d at 582. We cannot say that it was unreasonable for the Tennessee Supreme Court to conclude that counsel's failure to call additional lackluster lay witnesses did not prejudice Henley at the mitigation phase.

We similarly reject Henley's argument that the state court unreasonably found no prejudice in counsel's failure to call a psychiatric expert to testify, in counsel's words, that Henley "has learning disabilities and dropped out of school, and was, at the time of the offense, suffering from depression and/or acting out of character." In *Strickland* itself, 466 U.S. at 676, 700, 104 S.Ct. 2052, the Supreme Court found no prejudice arising from counsel's failure to call a psychiatric expert to testify that the defendant was "chronically frustrated and depressed" due to his inability to support his family financially. Henley's alleged depression resulting from his bankruptcy is similar enough to that found wanting in *Strickland* that it was not unreasonable to have treated Henley's claim the same way. The rest of the proposed expert testimony is so banal that it was not unreasonable to conclude that there was no "reasonable probability" that it would have affected the outcome of the mitigation phase. *See Strickland*, 466 U.S. at 694, 104 S.Ct. 2052 (discussing the "reasonable probability" standard for showing prejudice).

V. Procedural Default of Due Process Claims

Henley believes that the prosecution gave Flatt favorable parole treatment in exchange for his testimony against Henley. Henley's habeas petition claims that his due process rights were violated when Flatt falsely denied receiving these benefits and the

prosecutor let this falsity go uncorrected. He also argues, relatedly, that the prosecution violated his due process rights by withholding evidence of this supposed agreement. Essentially, these arguments present claims under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Henley pressed neither theory before the state courts, and any attempt to now seek post-conviction relief in the Tennessee courts would be procedurally barred. Tenn.Code Ann. § 40-30-102.

To overcome this procedural default and have these claims heard by a federal court, Henley must establish that (1) he had good cause for failing to raise them before the state courts and (2) he was prejudiced by the default. *See, e.g., Edwards v. Carpenter*, 529 U.S. 446, 451, 120 S.Ct. 1587, 146 L.Ed.2d 518 (2000).[2] A petitioner who has procedurally defaulted a *Brady* claim satisfies the "cause and prejudice" test for overcoming the default by satisfying the second and third prongs of the *Brady* test; that is, by showing that "the reason for his failure to develop facts in state-court proceedings was the State's suppression of the relevant evidence," and that "the suppressed evidence is 'material' for *Brady* purposes." *Banks v. Dretke*, 540 U.S. 668, 691, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004); *see also Strickler v. Greene*, 527 U.S. 263, 282, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999).

Henley cites *Banks* for the proposition that he had little responsibility to inquire into the facts surrounding his *Brady* claims—that is, he "cannot be

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[2] Henley could also overcome the procedural default without establishing "cause and prejudice" if he demonstrated "a sufficient probability that [the] failure to review his federal claim will result in a fundamental miscarriage of justice." *Edwards*, 529 U.S. at 451, 120 S.Ct. 1587. We do not think this standard is met here.

faulted for not catching a prosecutor in his or her lies or withholding of evidence." This mischaracterizes *Banks*. While *Banks* did reject a rule that "defendants must scavenge for hints of undisclosed *Brady* material," see *id.* at 695, 124 S.Ct. 1256, it retained the rule that good "cause" must be based on "events or circumstances 'external to the defense.' " *See id.* at 696, 124 S.Ct. 1256 (quoting *Amadeo v. Zant*, 486 U.S. 214, 222, 108 S.Ct. 1771, 100 L.Ed.2d 249 (1988)). That is, Henley still must demonstrate that because of some external impediment over which he had no control, he cannot be expected to have developed his *Brady* claim in state court. But he makes no attempt to do so.

Henley points to the fact that Flatt was considered for early release in 1989 and paroled in 1991—despite disciplinary violations in prison—long before his 25-year sentence had run its term, and earlier than similarly situated offenders tend to be paroled. He also points to various state officials' statements indicating that they supported, or at least did not oppose, Flatt's early release. Even assuming these circumstances suggest a surreptitious deal, Henley never explains why he did not present them in state post-conviction proceedings—which pended more than six years after Flatt's parole release. For these reasons, we hold that Henley has failed to establish "cause" sufficient to excuse the procedural default of his *Brady* claims.

VI. Prosecutorial Misconduct

Henley raises two prosecutorial misconduct claims: (1) that the prosecutor improperly vouched for a witness during the guilt phase, and (2) that the prosecutor improperly asked the jury to send a message during the sentencing phase. Because the Tennessee Supreme Court considered each of these claims on direct appeal, *Henley*, 774 S.W.2d at 910-11, 913, we must assess whether that court's treatment of

these claims was contrary to or an unreasonable application of clearly established Supreme Court precedent.

In *Berger v. United States*, the Supreme Court counseled United States Attorneys "to refrain from improper methods calculated to produce a wrongful conviction." 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). *Berger* was, however, decided on direct review where the Court could "broad[ly] exercise [its] supervisory power." *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986) (citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)). At this habeas stage, Henley must show that any prosecutorial misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly*, 416 U.S. at 643, 94 S.Ct. 1868.

The Tennessee Supreme Court denied relief to Henley on direct review by holding that any error in the prosecutor's vouching for Flatt was harmless. *Henley*, 774 S.W.2d at 911. In response to a credibility attack by defense counsel, the prosecutor commented, "I thought Flatt made one of the best witnesses I've ever seen." *Id.* The prosecutor also began to comment on the "plea bargain process" but "was interrupted by the objection of defense counsel and he abandoned this line of argument." *Id.* Although the Tennessee Supreme Court analyzed these claims under state law, the absence of prejudice spurred its rejection: the court labeled the first remark "innocuous" and viewed the second as resulting from a tense atmosphere where "the argument was improper on both sides." *Id.*; *see also United States v. Young*, 470 U.S. 1, 13, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985) (noting that invited error can affect how a court determines an improper remark's effect on the trial as a whole). In *Darden*, the most

recent United States Supreme Court precedent available to the Tennessee Supreme Court as it decided *Henley*, the Court assessed the prosecutor's argument as improper, some of it as invited, and on balance, concluded Darden received a fair, if not perfect, trial. 477 U.S. at 182, 106 S.Ct. 2464. Based on both the limited nature of the prosecutor's comment in this case, and in light of *Darden* and *Young*, the Tennessee Supreme Court's denial of relief for improper vouching was neither contrary to nor an unreasonable application of Supreme Court precedent.

As for the claim arising from the sentencing hearing, the Tennessee Supreme Court held that the prosecutor's "reference to deterrence ... is an area into which he may not venture." 774 S.W.2d at 913. That court then held, however, that it was "satisfied that the prosecutor's comments did not affect the jury's sentencing decision." *Id.* In *Caldwell v. Mississippi*, the Supreme Court held that a prosecutor's closing argument violated the Eighth Amendment by improperly referring to automatic appellate review of death sentences. 472 U.S. 320, 336, 340, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). The *Caldwell* Court distinguished *Donnelly* both by the nature of the comment and by noting that the trial judge in *Donnelly* gave a curative instruction; in contrast, the trial judge in *Caldwell* openly agreed with the prosecutor's improper remark. *Id.* at 339-40, 105 S.Ct. 2633. In light of *Caldwell*, vacatur of Henley's sentence was not required because the trial judge sustained the defense counsel's objection and admonished the prosecutor to discontinue that line of argument. We thus hold that the Tennessee Supreme Court's decision was neither contrary to nor an unreasonable application of *Caldwell* and other United States Supreme Court precedent.

VII. Jury Instruction

Henley complains that the jury instructions and verdict forms were worded so as to require the jury to unanimously find the existence of a mitigating factor. He attempted to raise this claim in his state post-conviction proceedings, but the state courts (erroneously, it seems) concluded that it had been raised on direct appeal and therefore refused to consider the claim. None of the post-conviction courts ever invoked a procedural bar as to this issue, but none of the state courts adjudicated the claim on its merits, either—in these circumstances, we review de novo. *See Linscott v. Rose*, 436 F.3d 587, 592 (6th Cir.2006).

The jury must be unanimous in determining that an aggravating factor exists. *See Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). But a state may not, consistent with the Eighth Amendment, require that the jury be unanimous in determining that a mitigating factor exists. *E.g., McKoy v. North Carolina*, 494 U.S. 433, 443-44, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990); *Mills v. Maryland*, 486 U.S. 367, 373- 75, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988). In this case, the jury instructions read:

> If the jury unanimously determines that at least one statutory aggravating circumstance ... [has] been proven by the State beyond a reasonable doubt, and said circumstance ... [is] not outweighed by any sufficiently substantial mitigating circumstances, the sentence shall be death....
>
> If the jury unanimously determines that no statutory aggravating circumstance ... [has] been proved by the State beyond a reasonable doubt, or if the jury unanimously determines that a statutory aggravating circumstance ... [has] been proven by the state beyond a reasonable doubt,

> but that said circumstance ... [is] outweighed by one or more mitigating circumstance, the punishment shall be life imprisonment....

The verdict form for sentencing Henley to death read:

> We, the Jury, unanimously find the following listed statutory aggravating circumstance or circumstances.... Secondly, we, the Jury, unanimously find that there are no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so listed above....

The question here is whether either of these admonitions requires the jury to be unanimous in determining that a mitigating factor exists. *Mills* established that if there is a "substantial possibility" that the answer is yes, the court must remand for resentencing. 486 U.S. at 377, 108 S.Ct. 1860. But the plain language of both the instructions and the verdict form require unanimity as to the weighing of aggravating and mitigating circumstances—not the existence of a mitigating circumstance. In other words, these admonitions simply and unobjectionably require a unanimous verdict. We reviewed identical instructions and verdict forms in *Coe* and concluded the instructions and form required "unanimity as to the results of the *weighing*, but this is a far different matter than requiring unanimity as to the *presence* of a mitigating factor." 161 F.3d at 338. As in *Coe*, "[n]othing in this language could reasonably be taken to require unanimity as to the presence of a mitigating factor. The instructions say clearly and correctly that in order to obtain a *unanimous verdict*, each juror must conclude that the mitigators do not outweigh the aggravators." *Id.* Thus, we hold that the Tennessee court did not require the jury to be unanimous in

finding the existence of a mitigating factor, and we affirm the district court's denial of this claim.

VIII. Conclusion

For the foregoing reasons, we affirm the district court's judgment.

CONCURRING IN PART, DISSENTING IN PART

R. GUY COLE, Jr., Circuit Judge, concurring in part and dissenting in part.

I agree with the majority's conclusion that (1) the trial court did not improperly instruct the jury that it had to unanimously find any mitigating factors in sentencing Henley; (2) the prosecutor did not improperly appeal to the jury to "send a message" as a reason for sentencing Henley to death; (3) the prosecutor did not improperly vouch for the testimony of Henley's accomplice, Terry Flatt; and (4) Henley procedurally defaulted on his claim that Flatt falsely testified in exchange for an assurance of early release from prison. I write separately because I disagree with the majority's disposition of Henley's due-process challenge to the selection of his grand-jury foreperson and his ineffective-assistance-of-counsel claim.

The majority concludes that Henley's due-process claim, alleging that women were underrepresented in the selection of his grand-jury foreperson, fails because *Campbell v. Louisiana*, 523 U.S. 392, 118 S.Ct. 1419, 140 L.Ed.2d 551 (1998), announced a new rule of constitutional law. *Campbell*, however, does not announce a new rule but rather is dictated by the Supreme Court's prior decisions in *Peters v. Kiff*, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972) (plurality opinion), and *Hobby v. United States*, 468 U.S. 339, 104 S.Ct. 3093, 82 L.Ed.2d 260 (1984). Moreover, the majority's conclusion that it was not unreasonable for

the Tennessee Supreme Court to conclude that Henley was not prejudiced by his trial counsel's deficient performance is incorrect. Henley has shown that his trial counsel's performance was both deficient and prejudicial under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Accordingly, because I would grant Henley habeas relief on his ineffective-assistance-of-counsel claim and would grant Henley an evidentiary hearing on his due-process challenge, I respectfully dissent.

A. Due-Process Challenge To The Selection Of Henley's Grand-Jury Foreperson

Henley asserts a due-process challenge to the systematic exclusion of women, in Jackson County, Tennessee, from the position of grand-jury foreperson. The Tennessee Court of Criminal Appeals determined that *Campbell* declared a new rule, and the court therefore concluded that *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), barred retroactive application of *Campbell* to Henley's claim. Both the Tennessee Court of Criminal Appeals and the majority erred in concluding that *Campbell* declared a new rule.

A conclusion that *Campbell* is dictated by precedent (and therefore does not announce a new rule of constitutional law) is supported by the Supreme Court's prior decisions in *Peters*, *Hobby*, *Rose v. Mitchell*, 443 U.S. 545, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979), and *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). In the cases leading up to *Campbell*, the Supreme Court repeatedly stressed its concern that discrimination, such as the kind complained of by Henley, hurts all defendants regardless of their race or gender and undermines the fair administration of justice.

In *Peters*, for instance, where a white defendant claimed that his due-process rights were violated because blacks were systematically excluded from both the grand jury that indicted him and the petit jury that convicted him, the Court explained that the exclusion of blacks "from jury service injures not only defendants, but also other members of the excluded class: it denies the class of potential jurors the 'privilege of participating equally ... in the administration of justice,' and it stigmatizes the whole class ... by declaring them unfit for jury service and thereby putting 'a brand upon them, affixed by law, an assertion of their inferiority.' " 407 U.S. at 499, 92 S.Ct.2163 (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308, 25 L.Ed. 664 (1879)).

The Court's concern with the integrity of the judicial system was also apparent in its decision in *Rose*. In *Rose*, as in *Peters*, the Court expressed its concern that "[s]election of members of a grand jury because they are of one race and not another destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process." *Rose*, 443 U.S. at 555-56, 99 S.Ct. 2993. *Rose* held that two black defendants could bring an equal-protection challenge to their convictions based on racial discrimination in the selection of the Tennessee grand jury and grand-jury foreperson that indicted them for murder. In addressing the harm caused by such discrimination, the Court stated that

> [t]he harm [from discrimination] is not only to the accused, indicted as he is by a jury from which a segment of the community is excluded. It is to society as a whole. *The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large,*

> *and to the democratic ideal reflected in the processes of our courts.*

Id. (quoting *Ballard v. United States*, 329 U.S. 187, 195, 67 S.Ct. 261, 91 L.Ed. 181 (1946)) (internal quotation marks omitted) (emphasis added).

In *Powers*, the Court held that Powers, a white male defendant, had standing to raise an equal-protection objection to the prosecutor's allegedly race-based exercise of peremptory challenges to exclude black prospective jurors. 499 U.S. at 402, 111 S.Ct. 1364. The Court stated that "[t]o bar petitioner's claim because his race differs from that of the excluded jurors would be to condone the arbitrary exclusion of citizens from the duty, honor, and privilege of jury service." *Id.* at 415, 111 S.Ct. 1364. In reaching its conclusion, the Court explained that it was not deviating from past precedent but rather was "once again declin[ing] to reverse a course of decisions of long standing directed against racial discrimination in the administration of justice." *Id.* (quoting *Cassell v. Texas*, 339 U.S. 282, 290, 70 S.Ct. 629, 94 L.Ed. 839 (1950) (Frankfurter, J., concurring in judgment)).

In *Campbell*, the Court reiterated that discrimination based on race "strikes at the fundamental values of our judicial system." 523 U.S. at 398, 118 S.Ct. 1419 (quoting *Rose*, 443 U.S. at 556, 99 S.Ct. 2993). The Court in *Campbell* concluded that a white, male defendant had standing to object to discrimination against blacks in the selection of his grand jury and grand-jury foreperson. In *Campbell*, the Court again addressed its concern that discrimination in the selection of a grand jury or grand-jury foreperson hinders the fair administration of justice and undermines the integrity of our judicial system—a common thread running through the opinions preceding *Campbell*.

Further, the decision in *Campbell* is dictated by the Supreme Court's decision in *Hobby* and *Peters*—the two cases the Court relied on in addressing Campbell's due-process challenge. In *Peters*, three justices agreed that a defendant, "whatever his race, ... has standing to challenge the system used to select his grand or petit jury, on the ground that it arbitrarily excludes from service the members of any race, and thereby denies him due process of law." 407 U.S. at 504, 92 S.Ct. 2163. In *Hobby*, the Court held that discrimination in the selection of a grand-jury foreperson, when that individual is selected from a properly constituted grand jury, does not violate due process. 468 U.S. at 344, 104 S.Ct. 3093. In *Hobby*, unlike in *Campbell*, the duties of the foreperson where only "ministerial." *Id.* Although the Court in *Hobby* assumed without deciding the third-party-standing question[1], the Court in *Campbell* nonetheless stated that its decision in *Hobby* "proceeded on the implied assumption that a white defendant had standing to raise a due process objection to discriminatory appointment of a federal grand-jury foreperson." 523 U.S. at 401, 118 S.Ct. 1419. Thus, the holding in *Campbell* is nothing more than a logical extension of the Court's assumption in *Hobby*, and is consistent with the Court's prior statements in *Rose*, *Peters*, *Hobby*, and *Powers* regarding the fair administration of justice. When the Court in *Campbell* finally concluded that all defendants, regardless of their race or sex, have standing to challenge discrimination against any individual in the selection of their grand or petit jury, the Court did not break new

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[1] In *Hobby*, the Court assumed, but did not decide, that a white, male defendant had standing to challenge discrimination against blacks and women. 468 U.S. at 342, 104 S.Ct. 3093 (explaining that "[i]t is only the narrow question of the remedy that we consider").

ground. Because *Campbell* is nothing more than an extension of the Court's prior precedents, *Teague* does not bar its retroactive application.

The majority relies on our prior decision in *Coe v. Bell*, 161 F.3d 320 (6th Cir.1998), to support its conclusion that *Campbell* was not dictated by precedent. In *Coe*, however, we did not address whether *Campbell* declared a new rule because we were not required to do so to dispose of *Coe's* due-process claim. Coe's conviction was final in 1984, before the Supreme Court's decision in *Hobby*, *Powers*, and *Campbell*. *Coe*, 161 F.3d at 328. We concluded that Coe did not have third-party standing to bring his due-process claim because we declared that *Hobby*, decided after Coe's conviction became final, declared a new rule. *Id.* at 354. Moreover, statements we made in *Coe* suggest that *Campbell* did not announce a new rule. In *Coe*, we stated that "[t]he *Campbell* Court read *Hobby* approvingly, as establishing some sort of due-process protection with regard to race." 161 F.3d at 354. We also stated that "[w]e do not doubt that *Hobby* and *Campbell* can be read as extending due-process protection to men challenging the exclusion of women." *Id.* These statements support a conclusion that, at a minimum, the Court's decision in *Campbell* was dictated by *Hobby*.

Further support for the conclusion that *Campbell* does not announce a new rule is found in the Fifth Circuit's decision in *Peterson v. Cain*, 302 F.3d 508 (5th Cir.2002)—the only other circuit to have addressed whether *Campbell* announced a new rule. Carter Paul Peterson's conviction and sentence became final in 1982. After the Supreme Court's decision in *Campbell*, Peterson sought habeas review in federal court, claiming that the selection process for his grand-jury foreperson in Lafayette Parish, Louisiana, violated his

constitutional due-process and equal-protection rights because the process systematically excluded blacks. The *Peterson* court concluded that the equal-protection portion of *Campbell*'s holding was dictated by the Supreme Court's earlier decisions in *Powers* and *Rose*. *Id.* at 512. According to the Fifth Circuit, "[t]here is no leap in logic nor a significant difference between *Powers* and *Rose v. Mitchell* to *Campbell*." *Id.* at 513. The *Peterson* court explained that in *Campbell*

> [o]nce again, the Court's concern is focused on the integrity of the judicial process in the selection of a grand jury foreperson. By applying rules established in prior cases, the Court conducted precisely the same analysis founded in maintaining judicial integrity as in *Powers*.

Id.

The Fifth Circuit also concluded that the due-process portion of *Campbell* was dictated by precedent, reasoning that the Court in *Campbell* only elaborated on the implied assumption the Court made in *Hobby*. Specifically, the Fifth Circuit noted that in *Campbell*

> the foreperson was selected not merely to conduct ministerial duties, but was also selected to act as a voting member of the grand jury, a vote that directly impacted the defendant. To the extent that such a selection was made discriminatorily, it ran afoul of the *Hobby* implied assumption of due process. The Court's decision in *Campbell* was therefore dictated by its opinion in *Hobby*.

Id. 513-514. In *Peterson*, the Fifth Circuit did not overlook our decision in *Coe*. The court noted that this Court "did address the subject [of *Campbell*] ... but did not resolve whether *Campbell* stood for a new rule, under either equal protection or due process prongs."

Id. at 512 n. 3. Further, the Fifth Circuit, in a later unpublished decision, reiterated that the Supreme Court's decision in *Campbell* was dictated by the Supreme Court's earlier decisions in *Powers*, *Rose*, *Hobby*, and *Peters*. *See Crandell v. Warden, Louisiana State Penitentiary*, 72 Fed.Appx. 48, 49 (5th Cir. July 11, 2003).

Accordingly, because *Campbell* did not announce a new rule of constitutional law, but rather was dictated by prior Supreme Court precedent, *Campbell* can be retroactively applied to Henley's claim. As a result, the Tennessee Supreme Court's decision, that Henley lacks standing to bring his due-process claim, is an unreasonable application of *Teague*. Thus, Henley is entitled to an evidentiary hearing to determine whether his claim, that women where under-represented in the selection of his grand-jury foreperson in Jackson County, Tennessee, from 1974 to 1994, is valid.

B. Ineffective Assistance of Counsel

The majority also concludes that the Tennessee Supreme Court did not unreasonably apply *Strickland* when it held that counsel's alleged errors during the sentencing phase did not prejudice Henley. I disagree and would grant Henley habeas relief on this claim.

I am not alone in my conclusion that Henley's counsel at sentencing was constitutionally deficient: Three judges on the Tennessee Court of Criminal Appeals and two judges on the Tennessee Supreme Court also reached the same conclusion. *See Henley v. State*, No. 01 C01-9506-CC-00193, 1996 WL 234075, at *10-12, 1996 Tenn.Crim.App. LEXIS 293, at *31-36 (May 9, 1996); *Henley v. Tennessee*, 960 S.W.2d 572 (Tenn.1997) (Reid, J. & Birch, J., dissenting). At Henley's post-conviction hearing, Henley presented evidence that although several of his family members

would have testified on his behalf at his sentencing hearing, his trial counsel failed to speak to any of them about such a possibility. *Henley*, 1997 WL 820889, at *11, 1996 Tenn.Crim.App. LEXIS 293, at *32; *see also Henley*, 960 S.W.2d at 576-77. The Tennessee Court of Criminal Appeals noted that "[n]o psychological or psychiatric evaluation was done on Henley.... There is no evidence from [Henley's attorney's] file or otherwise that he investigated Henley's educational background, employment history, or that he spoke with members of the community familiar with Henley." *Henley*, 1996 WL 234075, at *12, 1996 Tenn.Crim.App. LEXIS 293, at *35. Further, the evidence that Henley's attorney did provide at the sentencing hearing was minimal: only Henley and his grandmother, who had already testified at trial, testified in mitigation.

The Supreme Court in *Strickland* explained that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691, 104 S.Ct. 2052. In a capital case, an attorney has a duty to speak to the defendant's family about the defendant's background and about the possibility of them testifying at the sentencing hearing. *See Wiggins*, 539 U.S. at 524, 123 S.Ct. 2527 (explaining that in a capital case trial counsel must undertake "to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor") (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C) (1989)); *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052 (noting that "counsel has a duty to make reasonable investigations"). Moreover, had Henley's counsel conducted a proper investigation into Henley's background, it may have revealed other mitigating

evidence that could have persuaded just a single juror to sentence Henley to life in prison as opposed to death. Because there is no evidence that Henley's attorney investigated Henley's background or spoke to his family members about testifying at Henley's sentencing hearing, despite their willingness to do so, the performance of Henley's attorney fell below the standard for "professionally competent assistance" required by *Strickland*. 466 U.S. at 690, 104 S.Ct. 2052.

Further, trial counsel's failure to call Henley's family members to testify coupled with Henley's mother's refusal to testify were prejudicial. At Henley's sentencing hearing, Henley's trial counsel attempted to call Henley's mother as a witness. After being called, Mrs. Henley first asked to speak to Henley's attorney. After a brief recess, Mrs. Henley did not testify and Henley's attorney instead called Henley's grandmother to the stand. At his post-conviction hearing, Henley argued that he was prejudiced because the jurors saw his mother's refusal to testify. According to Mrs. Henley, she refused to testify at the sentencing hearing because Henley's attorney had not contacted her about testifying and she did not understand the purpose for her testimony or what she was expected to say. Mrs. Henley did explain that had she been properly prepared she would have testified and her testimony would have been positive. *Henley*, 960 S.W.2d, at 576. Specifically, Mrs. Henley would have testified "about her son's life, her love for him, and her belief that he would not have committed the crimes 'if he was at his right mind.'" *Id.*

The Tennessee Court of Criminal Appeals concluded that Henley's evidence established prejudice resulting from his counsel's deficient performance: "We do not think it is assuming too much to conclude that a jury is going to be prejudiced against a

defendant upon that person's own mother refusing to testify on his ... behalf." *Henley*, 1996 WL 234075, at *11, 1996 Tenn.Crim.App. LEXIS 293, at *32. Because of the special relationship between a mother and child, not having one's own mother testify on their behalf, when one's life is at stake, would surely affect a juror's decision. As to the testimony of Henley's other family members, the Tennessee Supreme Court concluded that the testimony was weaker than the grandmother's testimony, because of their limited relationship with Henley, and cumulative of the grandmother's testimony, because Henley's other family members would have provided no new insight into Henley's life. However, having multiple family members plead for a defendant's life humanizes the defendant and makes it more likely that at least one juror will spare his life. *See generally Hardwick v. Crosby*, 320 F.3d 1127, 1163 (11th Cir.2003) (explaining that a defendant's attorney must conduct a proper investigation to "find witnesses to help humanize the defendant, given that a jury has found him guilty of a capital offense"); *Mayes v. Gibson*, 210 F.3d 1284, 1288 (10th Cir.2000) (noting that "mitigation evidence affords an opportunity to humanize and explain"). In this context, where the defendant is charged with a heinous crime, positive cumulative testimony benefits the defendant because the testimony of several family members all pleading for the defendant s life has a greater impact on the jury than the testimony of a single individual, regardless of how favorable that person's testimony is. Thus, had Henley's trial counsel not been deficient, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. Accordingly, because the Tennessee Supreme Court unreasonably applied

Strickland, I would grant Henley habeas relief on this claim.

SEE RULE 19 OF THE RULES OF THE COURT OF CRIMINAL APPEALS RELATING TO PUBLICATION OF OPINIONS AND CITATION OF UNPUBLISHED OPINIONS.

COURT OF CRIMINAL APPEALS OF TENNESSEE, AT NASHVILLE.

STEVE HENLEY, APPELLANT,

v.

STATE OF TENNESSEE, APPELLEE.

C.C.A. NO. 01C01-9506-CC-00193

May 9, 1996.
Permission to Appeal Granted March 10, 1997.

1996 WL 234075

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR RESENTENCING

PEAY *OPINION*

The petitioner was convicted by a jury of two counts of first-degree murder and one count of aggravated arson. The jury set the petitioner's punishment at death by electrocution for the murder convictions, and the court sentenced him to twenty years for the arson offense. The petitioner's

convictions and sentences were affirmed by our Supreme Court on direct appeal. *State v. Henley*, 774 S.W.2d 908 (Tenn.1989). He then filed a petition for post-conviction relief which was denied after a hearing.

The petitioner now appeals, contending that the lower court erred in failing to find that:

1. His constitutional rights against unreasonable searches and seizures were violated when evidence of Terry Flatt's identity was obtained during a pretextual arrest and subsequently used at trial;

2. His due process rights to a fair trial were violated when

(a) the trial court admitted into evidence a pistol which was irrelevant and highly prejudicial;

(b) the jury was informed that a criminal defendant serving a life sentence would be eligible to be considered for parole in thirty-five years;

(c) the State provided antianxiety and narcotic medications to him during the course of his trial; and

(d) the State withheld exculpatory information in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), when it failed to inform his counsel about the medications he was taking;

3. The jury instructions given at the sentencing phase of his trial were unconstitutional;

4. Tennessee's death penalty statutes are unconstitutional;

5. His constitutional right to a trial by jury was denied when jurors opposed to the death penalty were excused by the trial court; and

6. He was denied effective assistance of counsel at the guilt and sentencing phases of his trial and at the direct appeal of this matter.

We find the petitioner's complaint of ineffective assistance of counsel at the sentencing phase to be meritorious; we find no merit in any of his other allegations. We will address the petitioner's issues in the order given after a brief recitation of the facts.

On July 24, 1985, the petitioner and Terry Flatt were riding around together in the petitioner's truck attending to some of Henley's business chores. Flatt testified that they had been drinking beer and taking Dilaudid (a narcotic). Early in the evening, they drove up Pine Lick Creek Road in Jackson County, where the petitioner's grandmother lived. The victims, Fred and Edna Stafford, lived on the same road. A short distance before his grandmother's house, but after passing the Stafford residence, Henley let Flatt out of the truck. Henley then proceeded to his grandmother's house where he spent some amount of time less than an hour. He then returned and picked Flatt up and they proceeded back down the road.

According to Flatt, Henley returned with a .22 rifle. Flatt testified that Henley had stopped the truck and loaded this rifle shortly before reaching the Stafford residence. Flatt testified that Henley had also poured some gasoline out of a five gallon can into a smaller plastic jug. They then proceeded to the Stafford house.

The Staffords were outside as the petitioner and Flatt reached their house. According to Flatt, Henley got out of the truck and told the Staffords that Flatt would kill him if they didn't give him money. He then told Flatt to bring the .22 as he walked the Staffords up their driveway. Flatt testified that, as they had all gotten closer to the house, Henley took the rifle away from him and told Flatt to "go back to my truck and get that gallon of gas." Flatt did as he was told and Henley and the Staffords entered the house.

As Flatt approached the house with the gasoline, he saw Henley shoot Mr. Stafford with the rifle. Henley next shot Mrs. Stafford with the rifle and then, Flatt testified, "he took out his pistol and he shot her a time or two with his pistol." After shooting the Staffords, Henley told Flatt to pour out the gas. Flatt poured out a small amount, and then stopped. Henley took the plastic jug containing the gas, poured the rest of it out, and then told Flatt to "light it." Flatt refused, and Henley struck a match and set fire to the house.

Henley and Flatt then ran to the truck and drove away. While they were driving, Henley pulled some money out of a pocket and told Flatt to count it. Flatt testified that he had not seen that money on Henley before. After they had driven some distance, Henley stopped the truck and got out and threw the rifle and pistol off to the side of the road. They then drove on.

The fire was reported, but the house was totally consumed by the flames. Only portions of Mr. and Mrs. Stafford's bodies were recovered. However, sufficient remains existed to determine that Mr. Stafford died of a bullet wound through the heart and Mrs. Stafford died of burns and inhalation of noxious gasses.

Pursuant to a plea bargain agreement, Flatt pled guilty to two counts of second-degree murder, two counts of armed robbery and one count of aggravated arson. Flatt was sentenced as a Range I offender to twenty-five years for each of the murders, ten years for each of the robberies, and ten years for the arson, all to run concurrently.

At trial, Henley testified that he had spent the day with Flatt but that he had not taken any Dilaudid nor been intoxicated with alcohol. He testified that he had asked Flatt to get out of his truck on the way to his grandmother's because of Flatt's intoxicated condition,

and that Flatt had taken Henley's .22 rifle with him, ostensibly to hunt. Henley adamantly denied killing the Staffords and setting their house on fire.

"In post-conviction relief proceedings the petitioner has the burden of proving the allegations in his [or her] petition by a preponderance of the evidence." *McBee v. State*, 655 S.W.2d 191, 195 (Tenn.Crim.App.1983). Furthermore, the factual findings of the trial court in hearings "are conclusive on appeal unless the evidence preponderates against the judgment." *State v. Buford*, 666 S.W.2d 473, 475 (Tenn.Crim.App.1983).

The petitioner's claim that his arrest was pretextual rests on the grounds that he was first arrested during the early morning hours of Friday, July 26, 1985, pursuant to an outstanding warrant on a contempt of court charge. We first note that this issue was not raised in the trial, the direct appeal of this case, or in the post-conviction petition. Accordingly, it is waived. T.R.A.P. 36. However, even if this issue were not waived, the petitioner is not entitled to any relief on this ground.

"The fact that an accused has been unlawfully arrested only becomes relevant when evidence tainted by the unlawful arrest is sought to be introduced by the state." *Caldwell v. State*, No. 02C01-9405-CC-00099, p. 12, Madison County (Tenn.Crim.App. filed December 28, 1994, at Jackson). In this case, the petitioner contends that he was questioned about the fire while under arrest on the contempt of court charge, and that he then gave a statement including Terry Flatt's name. Accordingly, the petitioner argues, any evidence obtained from Flatt is tainted such that it must be suppressed. However, the record in this matter is unclear as to the petitioner's arrest status at the time he spoke of Flatt. The only written record of the petitioner's statement is dated July 30,

1985. Henley testified that he had first spoken to the fire inspector "within a couple of days" of his initial arrest. Henley's testimony at the post-conviction hearing also indicates that he was arrested a second time on August 1, 1985. However, there is no testimony as to when Henley was released after his first arrest. Thus, even assuming that Henley's arrest on the contempt of court charge was "pretextual," there is no clear proof in the record that the petitioner was still under arrest for this charge at the time he informed the authorities about Flatt's identity. This issue is without merit.

The petitioner also complains that he was denied due process when a .380 pistol was introduced at trial. Although Flatt testified that Henley had used a pistol to shoot Mrs. Stafford, and although the pistol introduced at trial was recovered in the area where Flatt said Henley had thrown the guns, Flatt was not able to identify it. Nor were any bullets or shell casings recovered from the crime site that were fired from this pistol. The petitioner's trial counsel did not object to the introduction of the pistol into evidence.

This issue was not raised on direct appeal or in the post-conviction petition, and is therefore waived. Even if it were not waived, however, this issue is without merit.

Although Flatt was unable to identify the pistol as the one which Henley fired, it was found where Flatt had told authorities it would be found. It was also found in the vicinity of the .22 rifle. These facts were sufficient to meet the definition of "relevance" set forth in Fed.R.Evid. 401, adopted by our Supreme Court in *State v. Banks*, 564 S.W.2d 947, 949 (Tenn.1978). Had an objection been made, the trial court would had to have determined that the probative value of the pistol was substantially outweighed by the "danger of unfair

prejudice, confusion of the issues, or misleading the jury .... " in order to rule it inadmissible. *See* Fed.R.Evid. 403, also adopted by our Supreme Court in *State v. Banks*. We do not think that it would have been an abuse of discretion for the trial court to have overruled an objection. That no bullets or shell casings matching the pistol were found at the remains of the Stafford residence, and Flatt's inability to identify the pistol, were matters for the jury to take into consideration in determining the weight of this particular piece of evidence.

Furthermore, even if the pistol should have been excluded, the "improper admission or rejection of evidence is not grounds for reversal unless it shall affirmatively appear that the alleged error affected the result of the trial." *State v. Horne*, 652 S.W.2d 916, 919 (Tenn.Crim.App.1983). No such affirmative showing has been made here. Since there was sufficient proof at trial from which the jury could reasonably have concluded that Mr. Stafford had been killed by a shot from the rifle and that Mrs. Stafford had been killed by the fire, there was sufficient evidence, even absent the pistol, for the jury to convict Henley of two counts of first-degree murder.

The petitioner also complains that he was denied a fair trial when, during final arguments, the trial judge stated that a defendant serving a life sentence would be eligible to be considered for parole after serving thirty-five years. This issue was raised in the direct appeal and denied. Accordingly, we consider it previously determined and decline to re-examine it. T.C.A. § 40-30-111 (1990).

As to the petitioner's contention that he was denied due process by the State's provision to him of certain medication during his trial, we find that this case is distinguishable from *Riggins v. Nevada*, 504 U.S. 127,

112 S.Ct. 1810 (1992), and that no denial of due process occurred. In *Riggins*, the defendant had been prescribed and was taking thioridazine, an antipsychotic drug. He was taking this drug at the time he was determined competent to stand trial. Following his competency hearing, the defendant filed a motion in the District Court for an order suspending administration of the drug, contending that its effect on his demeanor and mental state during his trial would deny him due process. The District Court denied the defendant's motion, with no explanation of its rationale, and the defendant continued to receive the drug throughout his trial.

The Supreme Court held that "once Riggins moved to terminate administration of antipsychotic medication, the State became obligated to establish the need for [it] and the medical appropriateness of the drug." 504 U.S. at —, 112 S.Ct. at 1815. Because the record before the Court contained no findings that would have supported a conclusion that the continued administration of the medication was necessary to accomplish an essential state policy, the defendant's convictions were reversed and his case remanded.

In the case before us, Henley was taking Xanax and P.V. Tussin before and during the course of his trial. Xanax is an antianxiety medication and P.V. Tussin is a cough syrup which contained alcohol and "a narcotic cough suppressant." The expert testimony at the post-conviction hearing established that these drugs could have had an adverse effect on both the petitioner's demeanor and on his ability to fully participate in his own defense. However, there is no proof in the record that Henley was being medicated against his will. According to Dr. Byrne, the prescribing physician, the petitioner requested medication for his nervousness, anxiety and sleeplessness. *Cf. Groseclose v. Bell*, 895

F.Supp. 935, 949 (M.D.Tenn.1995) ("[the defendant] did not request the medication ... [, t]here was no appointment requested by [the defendant] and [he] never asked for or indicated that he was having any trouble sleeping."). Henley specifically requested Valium, but Dr. Byrne prescribed Xanax instead because it did not have the dependency potential of Valium. The P.V. Tussin was prescribed in response to the petitioner's complaint of a cough and his specific request for a medication with hydrocodone, which P.V. Tussin contained.

On the record before us, we cannot find that Henley's own behavior in requesting and taking these medications violated his due process rights.[1] To do so would be to indicate that an accused could request medication on the grounds of having difficulty sleeping, excessive nervousness, high anxiety, depression, etc., and then claim that he was denied a fair trial because of the medication's impact on his ability to participate in his own defense and/or because of the medication's adverse effect on his credibility. If the State refused to administer such medication out of concern that the accused would make such a claim, the accused could then argue that he had been denied his due process rights to proper medical care.[2] In other words, granting Henley relief under the circumstances of this case would create an unacceptable risk of deliberate manipulation of State-provided health care services in an attempt to create grounds for attacking a conviction.

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[1] Although there is proof in the record that Henley was taking more than the prescribed dosages, there is no proof in the record that he was being required to do so by his jailers.

[2] Indeed, Henley filed a civil rights action about his pre-trial incarceration, complaining about the length of time he had to wait to be taken to the doctor.

Such a result is untenable and not required by our Constitutions.

As to the petitioner's contention that the State withheld exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), by not informing his trial counsel about the medication that he was taking, we also find this issue to be waived. Moreover, this issue fails on the merits. Evidence required to be provided under *Brady* "must be favorable to the accused, his defense, or the sentence that will be imposed if found guilty." *State v. Marshall*, 845 S.W.2d 228, 232 (Tenn.Crim.App.1992). The petitioner argues that evidence of the medication he was taking during his trial was favorable because it explained his demeanor which, according to Henley's offer of proof at the post-conviction hearing, at least some of the jurors found objectionable.

However, there is no proof in the record that the prosecution was aware of the *effects* of these drugs, and it is only their effects which arguably constituted favorable evidence. Sheriff Mehaney testified at the post-conviction hearing that he knew nothing about the effects of the drugs his prisoner was taking. He also testified that he noticed no changes in Henley's behavior as a result of taking the drugs. The only person who arguably knew that the medication could affect Henley's credibility such that it was "exculpatory" to begin with, was the physician who prescribed it. However, there is no proof in the record that this person was under the control of the prosecution, and the duty to disclose does not arise as to information "which is not possessed by or under the control of the prosecution." *State v. Marshall*, 845 S.W.2d at 233. Moreover, the duty to disclose does not arise as to information "that the accused already possesses or is able to obtain." *Id.* There is no

contention here that Henley did not know he was taking the medication. Moreover, there is proof in the record that Henley understood the medication's soothing effects on him.

The petitioner claims he was denied his constitutional right to trial by jury because of the trial court's dismissal of jurors opposed to the death penalty. Because this issue was not raised on direct appeal, it is waived. T.R.A.P. 36. This issue is also without merit. It is proper for a court to excuse jurors who indicate that they will not vote for the death penalty regardless of their instructions. *Morgan v. Illinois*, 504 U.S. 719, 728, 112 S.Ct. 2222, 2229 (1992). Furthermore, "the trial court's finding on this issue is to be accorded a presumption of correctness inasmuch as such findings involve a determination of demeanor and credibility particularly within the trial court's province and ... the burden rests on the [petitioner] to establish by convincing evidence that the court's determination was erroneous." *State v. Harris*, 839 S.W.2d 54, 64 (Tenn.1992). The petitioner has failed to meet this burden.

The petitioner also contends that the sole aggravating factor relied on by the State in this case was unconstitutional. In seeking the death penalty, the State argued that the murders of Fred and Edna Stafford were each "especially heinous, atrocious, or cruel in that [each] involved torture or depravity of mind."[3] T.C.A. § 39-2-203(i)(5) (1982). The petitioner's

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[3] The trial court instructed the jury that "the word heinous means grossly wicked and reprehensible, abominable, atrocious and vile. Atrocious means extremely evil or cruel, monstrous, exceptionally bad, abominable. Cruel means disposed to inflict pain or suffering, causing suffering, painful. Torture means, the infliction of severe physical pain as a means of punishment or

claim that this aggravating factor was unconstitutional was denied by our Supreme Court in the direct appeal of this case. Further, we are bound by our Supreme Court's subsequent holdings that this aggravating factor passes constitutional muster. *See, e.g., State v. Hines,* — S.W.2d — (Tenn.1995), aff'd. on reh'g, — S.W.2d — (1996); *State v. Keen,* — S.W.2d — (Tenn.1994), reh'g granted; *State v. Black,* 815 S.W.2d 166 (Tenn.1991); *State v. Teel,* 793 S.W.2d 236 (Tenn.1990), *cert. denied,* 498 U.S. 1007 (1990); *State v. Thompson,* 768 S.W.2d 239 (Tenn.1989), *cert. denied,* 497 U.S. 1031 (1990).

Henley also complains about the trial court's jury instructions concerning mitigating circumstances. Again, this issue was previously determined in the direct appeal of this case and we decline to readdress it here.

We also decline to disagree with our Supreme Court's repeated holdings that Tennessee's death penalty statutes are constitutional. *See, e.g., State v. Howell,* 868 S.W.2d 238 (Tenn.1993), *cert. denied,* 62 U.S.L.W. 3624 (1994); *State v. Van Tran,* 864 S.W.2d 465 (Tenn.1993), *cert. denied,* 62 U.S.L.W. 3691 (1994); *State v. Black,* 815 S.W.2d 166 (Tenn.1991).

Resolution of the foregoing issues leaves us with the petitioner's primary complaint, to-wit, that he received ineffective assistance of counsel at his trial. We must first note that James H. Reneau, III, who represented Henley at his trial and on direct appeal, died before he was able to testify in this proceeding. Accordingly, we are constrained in our ability to

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coercion[; t]he experience of this[;] mental anguish[;] any method or thing that causes such pain or anguish[;] to inflict would create [sic] physical or mental pain. Depravity means moral corruption, wicked, or preversed [sic] acts."

examine the reasons behind any of Mr. Reneau's actions. We do, however, have the benefit of a copy of Mr. Reneau's entire file in this matter.

Specifically, the petitioner claims that his counsel was ineffective in the following ways:

1. He failed to assemble a 'defense team," including a second lawyer, a mental health expert, an investigator, an arson expert, and "others";

2. He did not conduct sufficient investigation into the case, including "appropriate" interviews with Henley;

3. There was no attempted negotiation toward a plea bargain;

4. He did not challenge Henley's arrest on the contempt of court charge;

5. He failed to keep out of evidence the pistol and mention of a polygraph exam;

6. He failed to move for a change of venue;

7. He did not attempt to rehabilitate jurors excused by the court because of their views on the death penalty;

8. He "never developed a strategy" in the case;

9. He made no opening statement to the jury;

10. He did not request a jury instruction on voluntary intoxication; and

11. He did not prepare adequately for the sentencing hearing, and did not effectively represent the petitioner at the sentencing hearing.

The petitioner also claims that Mr. Reneau was ineffective on the direct appeal of this matter.

In reviewing the petitioner's Sixth Amendment claim of ineffective assistance of counsel, this Court must determine whether the advice given or services rendered by the attorney are within the range of

competence demanded of attorneys in criminal cases. *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn.1975). To prevail on a claim of ineffective counsel, a petitioner "must show that counsel's representation fell below an objective standard of reasonableness" and that this performance prejudiced the defense. There must to be a reasonable probability that but for counsel's error the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88, 692, 694 (1984); *Best v. State*, 708 S.W.2d 421, 422 (Tenn.Crim.App.1985).

When deciding whether counsel's performance was deficient, "every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland v. Washington*, 466 U.S. at 689. "Thus, the fact that a particular strategy or tactic failed or even hurt the defense does not, alone, support a claim of ineffective assistance." *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn.Crim.App.1992). We must defer to trial strategy and tactical choices when they are informed ones based upon adequate preparation. *Id. See also Hellard v. State*, 629 S.W.2d 4 (Tenn.1982).

On appeal, we are bound by the lower court's findings unless the petitioner carries his burden of illustrating that the evidence preponderates against the judgment entered. *Black v. State*, 794 S.W.2d 752 (Tenn.Crim.App.1990).

With respect to the petitioner's claim that his trial counsel was ineffective for failing to develop a trial strategy, we find that the record belies this assertion. It is obvious that trial counsel intended to discredit Flatt and to create reasonable doubt through attacking the State's case at every opportunity. This strategy included attacking Flatt's version of the events and his

credibility; attacking the identification and/or the relevance of the guns; attacking the State's investigation of the fire; and presenting the testimony of the petitioner. That trial counsel's strategy was not successful does not mean that there was no strategy at all. The petitioner has failed to carry his burden of proving that the evidence preponderates against the lower court's findings in this regard.

Trial counsel's strategic decision not to move for a change of venue was a valid tactical choice. Henley testified that Mr. Reneau had told him that he wanted the trial to be where Henley had been born and raised. Obviously, Mr. Reneau considered, and rejected, attempting to move the trial. Similarly, counsel's choice not to make an opening statement was not shown to be ineffective. The State introduced expert evidence at the post-conviction hearing that experienced criminal defense attorneys occasionally choose not to make an opening statement for strategic reasons. Of course, the petitioner introduced expert testimony contending that an opening statement is crucial to the defense. Since it is the petitioner's burden of proving the ineffectiveness of his counsel, and since Henley has shown no prejudice attaching particularly to Mr. Reneau's failure to make an opening statement, we cannot find that, in this regard, the evidence preponderates against the lower court's decision that Henley received competent counsel at the trial.

Mr. Reneau's decision not to attempt to rehabilitate jurors excused by the court because of their views on the death penalty was also a valid choice. *See Cooper v. State*, 847 S.W.2d 521, 535 (Tenn.Crim.App.1992) (Trial attorney "not fault[ed]" for not attempting to rehabilitate prospective jurors who stated that they would not impose the death penalty regardless of the

evidence.) Moreover, there is no proof in the record that any attempted rehabilitation would have been successful, hence no prejudice from Mr. Reneau's "omission" has been shown.

Trial counsel's decision not to request a jury instruction on the petitioner's alleged intoxication at the time of the offenses was also a valid tactical choice. The petitioner consistently and adamantly maintained that he had not been intoxicated at the time. Although trial counsel could legitimately have requested the jury instruction as a way of "hedging his bets" against the possibility that the jury would believe Flatt rather than his own client, we decline to find that his choice constituted deficient performance. Had Mr. Reneau argued voluntary intoxication, he ran the risk of being perceived as not believing his own client: a classic "damned if you do and damned if you don't" situation. Mr. Reneau's choice was reasonable under the circumstances.

The petitioner's complaint that Mr. Reneau was ineffective because he did not attempt to negotiate a plea is not supported by anything in the record indicating that such an attempt might have been successful. Attorney General Thompson, who also prosecuted the case against Henley, stated during the post-conviction hearing that a plea bargain "wasn't an option" and Henley testified that he would not have pled guilty to anything before his trial because he was innocent. Accordingly, the petitioner has failed to show any prejudice resulting from this alleged deficiency.

Similarly, as set forth above, the record does not support the petitioner's claim that tainted evidence was obtained during a pretextual arrest. Accordingly, no showing of prejudice has been made from trial counsel's failure to challenge this arrest.

As to Henley's claim that counsel was deficient in failing to keep out the pistol, we agree that an objection to its admissibility should have been made.[4] However, Mr. Reneau did an effective job of challenging the materiality of the pistol, and the record does not demonstrate that the result of the trial would probably have been different had the pistol been excluded. Accordingly, we find that the petitioner was not denied effective assistance of counsel in this regard.

Henley also fails to show how his trial counsel was deficient in failing to keep out Flatt's offhand reference to a period of time when he and Henley were waiting in a room "for the polygraph test." This reference could not have been anticipated from the question asked Flatt, and an objection arguably would simply have drawn more attention to it. Similarly, Chief Deputy Clifton Long's reference to a polygraph test was offhand and could not have been anticipated from the question asked. No witness testified that the tests had actually been administered, or as to the results of any polygraph tests. Counsel was not deficient in this regard.

Finally, we address Henley's contention that his trial counsel did not adequately investigate or prepare his case. With respect to the guilt phase of the trial, we do not find that the petitioner has carried his burden of overcoming the trial court's findings that Mr. Reneau was not deficient in his investigation and preparation of

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[4] Before the pistol was admitted into evidence, Mr. Reneau objected to the sheriff being questioned about where it was found on the basis of no personal knowledge. The trial court allowed the sheriff to testify about how he'd come into possession of it as it was shown to him by the prosecutor. When the pistol was later marked for identification, and subsequently entered into evidence, no objection was made.

this case for failing to interview him more "appropriately," to request an additional lawyer on the case, or for failing to otherwise assemble what the petitioner calls a "defense team." Henley has not shown any prejudice stemming directly from Mr. Reneau's decision to try this case by himself. Additionally, while Mr. Reneau did not hire the arson expert that the petitioner's post-conviction counsel did,[5] Mr. Reneau did offer some effective expert testimony challenging the State's investigation of the fire. Mr. Reneau also did an effective job of cross-examining the State's witness who conducted the fire investigation.

As to Mr. Reneau's failure to discover and investigate the petitioner's medicated state during the trial, the record simply does not support a finding that Mr. Reneau was deficient because he did not notice that his client was under the influence of drugs.[6] The petitioner repeatedly denied abusing drugs, and never disclosed to Mr. Reneau that he was currently taking medication. Other than Henley's mother and exwife's testimony at the post-conviction hearing that he "just didn't act himself" and that he acted "[l]ike he was drugged" before the trial, the record is bereft of any proof that Henley was behaving in such a way that should have alerted his counsel to inquire as to his

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[5] We can only speculate as to what this expert's testimony would have been had he actually investigated the fire. It is possible that he would have found incriminating evidence.

[6] Because Mr. Reneau died before he could testify in this proceeding, it is impossible to know for certain whether or not he was aware that Henley was taking Xanax and P.V. Tussin during the trial. It is possible that Mr. Reneau did know, and that he approved. However, the record supports the inference.

health.[7] Indeed, the sheriff in charge of the jail where Henley awaited trial testified that he hadn't noticed any change in Henley's behavior when he was taking the medication. Apparently, neither did Mr. Reneau, who had been meeting with Henley since August 1985. Henley started taking the medication at issue in December 1985.

We are disturbed about the possible effects that the drugs had on the petitioner's demeanor at trial and that there was no testimony explaining these effects to the jury. We are similarly disturbed that the petitioner's attorney had no psychological or psychiatric evaluation done on his client before trial which might have resulted in Henley being taken off of the drugs, or at least in an explanation about their effects. We are disturbed that Henley's attorney, apparently, was not aware that his client was taking these drugs. However, we are unwilling to hold that Mr. Reneau's performance was deficient because he failed to discern or investigate his client's medicated state, particularly in a case such as this where there is reason to believe that the client might have lied upon simple inquiry.[8] Moreover, the petitioner has to bear some responsibility for his own failure to inform his attorney about the medications he was taking. *See, e.g., State v.*

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[7] Defense counsel's offer of proof at the post-conviction hearing about the jurors' perceptions of the petitioner's demeanor at trial does not establish that his demeanor there was significantly different from what it normally was. Only a person who was familiar with the defendant's demeanor, both while he was taking the medication at issue and while he was not, would be competent to offer testimony about any change which arguably should have triggered an investigation.

[8] Although Henley steadfastly maintained at trial that he did not abuse drugs, Dr. Byrne testified that Henley had told him that he was "used to shooting four milligram[s] ... [of] Dilaudid."

Russell, 866 S.W.2d 578, 583 (Tenn.Crim.App.1991) (counsel not ineffective for failing to attack prior convictions on grounds that the defendant was under the influence of narcotics at the time she pled guilty where the defendant never told her attorney that she had been under the influence at the time); *Cf. Groseclose v. Bell*, 895 F.Supp. 935, 950 (M.D.Tenn.1995) (ineffective assistance where, among other things, the defendant told his lawyer that the State was giving him medication which he had never requested, but which had been prescribed, and counsel simply responded "then take it"). Finally, even if Mr. Reneau's performance in this regard was deficient, Henley has failed to show a reasonable probability that his medicated state had an adverse effect on the outcome of his trial. It is quite possible that Henley's demeanor while not on medication would have been equally unappealing to the jury.[9]

The record does not support a finding of deficient investigation into any other aspect of the guilt phase of Henley's trial.

As to Henley's contention that Mr. Reneau was also ineffective on the direct appeal of this matter, we find this issue without merit. We have addressed all of the issues which Henley claims should have been raised in the direct appeal, but weren't, and found that they do not afford him any grounds for relief. The petitioner therefore suffered no prejudice from Mr. Reneau's decision not to include them in the appeal. Accordingly, Henley's claim of ineffective assistance of

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[9] Given that Henley was also taking antianxiety medication at the post-conviction hearing, we can only infer that he has difficulty dealing with stressful situations without the benefit of such medication.

counsel on appeal fails. *Cooper v. State*, 849 S.W.2d 744, 747 (Tenn.1993).

We affirm the lower court's judgment that Henley is not entitled to any postconviction relief with respect to his convictions.

With respect to the sentencing phase of the trial, however, we find that Mr. Reneau's investigation and preparation were constitutionally deficient. Our Court has recognized that

'[a] lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing. This cannot effectively be done on the basis of broad general emotional appeals or on the strength of statements made to the lawyer by the defendant. Information concerning the defendant's background, education, employment record, mental and emotional stability, family relationships, and the like, will be relevant, as will mitigating circumstances surrounding the commission of the offense itself. Investigation is essential to fulfillment of these functions.'

Adkins v. State, No. 03C01-9106-CR-00164, pp. 42-3, Washington County (Tenn.Crim.App. filed December 2, 1994, at Knoxville) (citation omitted). Personal background and character information are highly relevant at a capital sentencing hearing "because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

Although many of Henley's family members, including his mother, testified at the post-conviction hearing that they would have been willing to testify on

Henley's behalf had they been asked, Mr. Reneau spoke to none of them prior to the sentencing hearing. Mr. Reneau called the petitioner's mother to the stand at the sentencing hearing without ever having spoken to her about testifying. Not understanding what was expected of her, she refused—in front of the jury—to testify. We do not think it is assuming too much to conclude that a jury is going to be prejudiced against a defendant upon that person's own mother refusing to testify on his or her behalf.[10]

Had they been prepared and called at the sentencing hearing, Henley's family members would have testified that they loved the petitioner; that he was a good and loving man; that he was not a violent man; that the offenses of which he was convicted were totally out of character for him; and that they were shocked by his arrest. They would have pled for his life. Additionally, the petitioner produced evidence at the post-conviction hearing that other potentially mitigating evidence existed that would have been discovered had Mr. Reneau conducted a more thorough investigation. Expert testimony indicated the possibility that Henley had suffered from depression, alcohol and drug abuse, and learning disabilities. In grade school, Henley's I.Q. tested at 89. He dropped out of high school after the tenth grade. Not long before the murders, Henley suffered severe financial losses, was forced to file bankruptcy, and lost the family farm. All of this would have been proper testimony for mitigation. *Eddings v. Oklahoma*, 455 U.S. 104, 117 (1982) (the Constitution requires the sentencer to "consider and weigh all of the mitigating

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[10] In the petitioner's offer of proof at the post-conviction hearing, one juror was quoted as saying, "If a man's own mother won't testify on his behalf then we know what we've got to do."

evidence concerning the petitioner's family background and personal history.") (O'Connor, J., concurring); *Lockett v. Ohio*, 438 U.S. 586 (1978).

In spite of all the mitigating evidence available, only two people testified on Henley's behalf at the sentencing hearing: Henley himself and his grandmother. The jury had already indicated that it did not believe Henley when it convicted him. Accordingly, it is reasonable to presume that Henley's testimony at his sentencing hearing would not have been particularly persuasive. It is also possible, if not likely, that Henley's grandmother was viewed with a certain amount of hostility because Flatt testified that it was on her behalf that Henley had felt compelled to attack the Staffords. Thus, of all the people that Mr. Reneau had available to him, the only two that testified were arguably the two least helpful.

"When the record shows a substantial deficiency in investigation, the normal deference afforded trial counsel's strategies is particularly inappropriate.... [This] Court will not credit a strategic choice by counsel when counsel 'did not even know what evidence was available.' " *Cooper v. State*, 847 S.W.2d at 530 (citation omitted). The record in this case shows such a substantial deficiency. No psychological or psychiatric evaluation was done on Henley. Other than Henley's grandmother, Mr. Reneau did not speak with Henley's family members prior to the sentencing hearing. There is no evidence from Mr. Reneau's file or otherwise that he investigated Henley's educational background, employment history, or that he spoke with members of the community familiar with Henley. He " 'should have investigated his background, checked his school records, ... his medical history, tried to find witnesses to demonstrate all aspects of his character." [He] should have requested a psychological

evaluation." *Bell v. State*, No. 03C01-9210-CR-00364, p. 42, Hamilton County (Tenn.Crim.App. filed March 15, 1995, at Knoxville), *cert. denied*, (quoting the court below).

While we have held that Mr. Reneau's failure to investigate his client's mental health was not ineffective assistance of counsel with respect to the guilt phase of this trial, we do find that it was ineffective with respect to the sentencing phase.

"[T]here is a qualitative difference between obtaining psychological information for the purpose of preparing a defense to the charges and using such evidence for the purpose of mitigating the punishment. Thus, it is not incompatible to present evidence of psychological or mental impairment during sentencing, even where a defense of factual innocence has been interposed at the guilt phase."

Bell v. State, supra at 46 (citation omitted). Combined with Mr. Reneau's failure to investigate Henley's family's availability and willingness to testify, and his failure to investigate other aspects of Henley's past, Mr. Reneau failed to meet the level of competence required by attorneys representing clients at the sentencing phase who are faced with the death penalty. *See State v. Terry*, 813 S.W.2d 420, 425 (Tenn.1991) the qualitative difference between the death penalty and all other punishments requires greater reliability in the sentencing determination).

We also find that Mr. Reneau's deficient performance at the sentencing phase prejudiced the petitioner. The petitioner made an offer of proof at the postconviction hearing that the jury considered the fact that Henley's mother refused to testify on her son's behalf. Even without this offer of proof, we hold that the dearth of favorable testimony offered at the

sentencing hearing, when significant amounts of favorable testimony were available, establishes a reasonable probability that, but for Mr. Reneau's deficient performance with respect to the sentencing phase of Henley's trial, the result of the proceeding would have been different.[11]

We find that the evidence preponderates against the lower court's finding that Henley received effective assistance of counsel at sentencing, and accordingly reverse that portion of the decision below, vacate the petitioner's death sentence and remand this matter for a new sentencing hearing. that Mr. Reneau was unaware that Henley was taking these drugs.

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[11] Unlike *State v. Melson*, 772 S.W.2d 417 (Tenn. 1989), this was not a case where the available mitigation evidence had already been presented during the guilt phase of the petitioner's trial.

SUPREME COURT OF TENNESSEE, AT NASHVILLE.

STEVE HENLEY, Appellee,

v.

STATE OF TENNESSEE, Appellant.

Dec. 15, 1997.
Rehearing Denied Jan. 26, 1998.

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960 S.W.2d 572

OPINION

DROWOTA, Justice.

In this post conviction proceeding, the trial court denied relief on all grounds alleged, and specifically found that the petitioner, Steve Henley, had been afforded his constitutional right to effective assistance of counsel at the sentencing phase of his capital trial. The Court of Criminal Appeals found that the evidence preponderated against the trial court's denial of relief with respect to the sentencing phase, and concluded that Henley had been denied his right to effective assistance of counsel because trial counsel had failed to adequately investigate and prepare witnesses to testify on Henley's behalf and had failed to adequately investigate Henley's mental condition and request that he undergo a mental evaluation. Accordingly, the Court of Criminal Appeals reversed Henley's sentence of death and ordered a new sentencing hearing.

Thereafter, we granted the State permission to appeal to determine whether the intermediate court erred in concluding that the evidence preponderates against the trial court's finding that Henley was afforded his right to effective assistance of counsel at sentencing. After carefully reviewing the record, we have determined that the evidence supports the trial court's finding. Accordingly the judgment of the Court of Criminal Appeals ordering a new sentencing hearing is reversed, and the trial court's decision denying the petition for post conviction relief on all grounds alleged is reinstated.[1]

BACKGROUND

In 1986, the petitioner was convicted of aggravated arson and two counts of first degree premeditated murder for the killings of Fred and Edna Stafford, an elderly couple who were close neighbors to Henley's grandmother. According to the testimony of his co-defendant, Terry Flatt, the petitioner ordered both victims inside their home, shot them multiple times, and set their house on fire. The proof introduced at trial to establish the defendant's guilt was summarized by this Court on direct appeal as follows:

> [T]he evidence showed that Fred and Edna Stafford lived on Pine Lick Creek Road in Jackson County, just a short distance from the farm, owned by Henley's family, where his grandmother lived. On the day of the Staffords' death Henley had visited his grandmother and obtained some mechanical parts for some work he was doing. Flatt was with him. Earlier in the day they had been driving about,

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[1] Oral arguments were heard in this case on October 8, 1997 in Columbia, Maury County, as part of this Court's S.C.A.L.E.S. (Supreme Court Advancing Legal Education for Students) project.

tending to business affairs of Henley's. During that time they had consumed some beer and also had taken some drugs, referred to in the record as Dilaudids. According to Flatt, as they passed the Staffords' residence Henley commented, 'there was some people that lived on that road that owed his grandmother or grandfather some money, and they done him wrong, his grandparents wrong years before, and he was going to stop and see about collecting some money off them.' Henley let Flatt out of the truck just before he reached his grandmother's house. When he returned five or ten minutes later he had a .22 rifle with him. They stopped fifty or seventy-five yards up the road where Henley loaded some more shells into the rifle. He also filled a plastic jug with gasoline from a five-gallon can he had in the back of the truck. They proceeded on toward the Stafford residence. When they reached there Mr. and Mrs. Stafford were standing on the left-hand side of the road looking at a small bridge where some construction work had recently been done, Henley stopped the truck, jumped out and told them, 'I want your money, if you don't give it to me this man in the truck here, he's going to kill me.' He then directed them to go to the house. Mr. Stafford said, 'Steve, if you want money or something, I got $80, maybe $100, you can have it.' He forced them on to the house at gunpoint and told Flatt to bring the .22 rifle as he followed behind them. When they got within 20 or 30 feet of the house he told Flatt to give him the rifle and go back to the truck and get the plastic jug of gasoline. Flatt did as directed. As he reached the porch he saw Henley begin to shoot. He first shot Mr. Stafford then turned and shot Mrs. Stafford a time or two. While she was laying on the floor moaning

and groaning he threw the rifle to Flatt, took out his pistol and shot her again with the pistol. He told Flatt to pour out some of the gas. Flatt endeavored to do as he was told and poured out a small amount. When he could not finish Henley took the container of gas from him and finished pouring it out. He then directed Flatt to light it. When Flatt said he could not he struck the match and as the flames went up they ran to the truck.

The house burned to the ground. The bodies of the Staffords were found in the ashes. All that remained of Mr. Stafford's body was part of the right leg and the trunk area. The body of Mrs. Stafford was similarly burned. It was determined that Mr. Stafford died from a gunshot wound to the chest with the bullet passing through his heart. Mrs. Stafford's death was caused by burns and inhalation of noxious gases from the fire. It was the opinion of the medical examiner that Mrs. Stafford lived a minute or longer after the fire began.

State v. Henley, 774 S.W.2d 908, 912 (Tenn.1989).

At trial Henley maintained his innocence and attempted to discredit the prosecution's evidence, particularly the testimony of co-defendant Flatt which was crucial to the State's case. The defense showed that by testifying, Flatt had gained the benefit of a plea bargain agreement, pursuant to which, Flatt had been allowed to plead guilty to two counts of second degree murder, two counts of armed robbery and one count of aggravated arson. Flatt was sentenced as a Range I offender to twenty-five years for each of the murders, ten years for each of the robberies, and ten years for the arson, all to run concurrently, for an effective sentence of twenty-five years.

Testifying in his own defense, Henley adamantly denied all knowledge of and involvement in the murders and arson. Henley acknowledged that he had spent the day in the company of Flatt, and he admitted that he had drank some beer. However, Henley flatly denied that he was intoxicated or under the influence of drugs. Henley said he did not like to drink beer and had never abused drugs. Henley testified that it was Flatt who was intoxicated and under the influence of the drug referred to in the record as Dilaudid. Henley said that he dropped Flatt off before arriving at his grandmother's house because of Flatt's intoxicated condition. Flatt left the truck with Henley's .22 gauge rifle planning to hunt rabbits. Henley said he proceeded to his grandmother's house and remained there for about forty-five minutes to an hour. Henley picked Flatt up when he left, but had no knowledge of Flatt's activities during the intervening time frame. Henley claimed that he did not see the fire at the Staffords' home and was not aware of their deaths until the next day. On cross-examination, Henley admitted that he previously had pleaded guilty to transporting stolen goods in interstate commerce. In addition, Henley admitted that he owed a substantial farming debt near the time of the killings and had filed for bankruptcy.

The defense called other witnesses during the guilt phase to corroborate Henley's testimony about his activities on the day of the murders and to provide background information about Henley's life. Henley's grandmother testified that around the time of the murders, Henley arrived at her home alone and stayed there for forty to forty-five minutes. On cross-examination, she admitted that she had seen Henley with the .22 rifle on Saturday before the Staffords were murdered on Wednesday.

After the jury convicted Henley of two counts of premeditated murder and arson, the case proceeded to sentencing. The State relied upon the proof it had presented at the guilt phase.

The defense offered further proof, first calling Henley's mother, who, in the presence of the jury said, "I want to talk to you Mr. Reneau." Defense counsel, J.H. Reneau, III, requested and was granted a short recess. He exited the courtroom with Dorothy Henley. When the sentencing hearing resumed, she did not take the stand, and the jury was not given an explanation for her failure to testify. Instead, the defense recalled Bertha Henley, the petitioner's seventy-five-year-old grandmother who testified that Henley, along with his parents, had lived in her household from the time he was born until he was two years old. In addition, Henley had spent every weekend and summer vacation thereafter in her home until he completed high school. She said that Henley had a very close relationship with his grandfather, and that, from a very young age, Henley had helped his grandfather with farm work. She described Henley as a "good child" who "minded" her well and who "always loved" her. Henley married when he was eighteen-years-old, and had two children, Gregg and Leanne. Even after his marriage, however, Henley's close relationship with his grandparents continued. Though he and his family moved from Tennessee to Maryland, Henley returned to Tennessee when his grandfather was diagnosed with cancer in May of 1976 and lived with his family in a trailer across from his grandparents' home so that he could help his grandfather with the farm work. After his grandfather died of cancer in July of 1976, Henley began working on the family farm full time and continued in that occupation from 1977 to 1983. During that time, Henley visited his grandmother almost everyday, and

continued to check on her regularly thereafter. She could not drive because she had suffered a heart attack, so Henley would drive her to the doctor and into town once a week to pay bills and buy groceries. Henley's grandmother described him as a "tender hearted" person who would cry when his feelings were hurt. She said he had always been kind and good to her, ever willing to provide her with needed assistance. She told the jury that she loved Henley, the eldest of her four grandchildren, and did not want to see anything happen to him. The State did not cross examine Bertha Henley at the sentencing hearing.

Henley also testified about his relationship with his grandparents and how he had played and worked on the farm from a very young age. When asked why he stayed with his grandparents, rather than his parents, on the weekends and during his summer vacations, Henley replied, "I'd just love them more than anything in the world. There's no way to explain my granddaddy, I don't guess. He was just the best person in the world." Henley recounted how he had given up his job in Maryland as a certified marine mechanic to return to Tennessee and assist his grandfather when he was diagnosed with cancer. Henley said he worked full time on the family farm from 1977 to 1983, and was successful for a time. His farming difficulties began with a drought in 1980 or 1981. To compensate for losses during the drought, he planted nearly seven hundred acres of wheat. Because of severe flooding, Henley was unable to harvest the wheat and lost his entire crop and ultimately was forced to file for bankruptcy protection. When trial counsel gave Henley the opportunity to make a final comment to the jury, Henley told the jurors, "I think each and everyone of you has made a mistake, and it's a mistake you all will have to live with. And one day and

time when we're all, wherever we go, we'll all have to face that." The State did not cross examine Henley at the sentencing hearing.

After hearing the proof, the jury sentenced Henley to death for both murders, finding that each murder was "especially heinous, atrocious, or cruel in that it involved torture or depravity of mind." Tenn.Code Ann. § 39-2-203(I)(5) (1982). This Court affirmed the convictions and sentences on direct appeal. *State v. Henley*, 774 S.W.2d 908 (Tenn.1989).

Thereafter, Henley instituted this action seeking post conviction relief. Among other things, Henley alleged that he was denied his constitutional right to effective assistance of counsel at the sentencing phase of his capital trial. Henley alleged that trial counsel's failure to investigate and prepare family members to testify on his behalf deprived the jury of hearing proof of his good character and non-violent nature. In addition, Henley alleged that trial counsel's failure to completely investigate his mental condition and request a mental evaluation constituted ineffective assistance of counsel. At the time of the evidentiary hearing on the petition, both the original trial judge, Robert H. Bradshaw, and the sole trial defense attorney, J.H. Reneau, III, were deceased.

In support of his first claim, Henley offered the testimony of his mother, his two sisters, his two children, and his second wife. Dorothy Henley, the petitioner's mother, said that trial counsel had not contacted her prior to trial and that the only time he had spoken to her about testifying was during the recess she requested after he had called her to the witness stand at the sentencing hearing in the presence of the jury. Mrs. Henley admitted that she told trial counsel during the recess that she did not want to testify, but said she had refused to testify only because

she had not understood the purpose of her testimony nor what she would have been expected to say on the witness stand. Had trial counsel explained to her the purpose of her testimony before the sentencing hearing, Mrs. Henley claimed she would have testified on behalf of her son.

Had she been properly prepared, Mrs. Henley said that she would have given testimony about her son's life, her love for him, and her belief that he would not have committed the crimes "if he was at his right mind." She would have told the jury that Henley was a good son who had a close relationship with his grandparents and who had suffered financial losses because of the failure of his farming operation. On cross-examination, Mrs. Henley acknowledged that she had lived in Davidson county at the time of the murders and that she had little contact with her son during the year preceding the homicides. She conceded that she had no more information about Henley's background than what his grandmother had testified about at the sentencing hearing.

The petitioner's children, Greg and Leanne Henley, testified that they were not told about the petitioner's trial until it had concluded. These witnesses said that, had they been contacted by trial counsel, they would have given evidence that Henley was a good father. Greg was twelve or thirteen years old at the time of the trial and Leanne was ten or eleven years old. At the time of Henley's trial, both children lived with their mother, Henley's first wife. In an affidavit offered by the petitioner at the evidentiary hearing, their mother stated that she would have allowed the children to testify if she had been contacted by trial counsel.

Stefanie Robinson, the petitioner's younger sister testified that she had not been contacted by trial counsel, but said, had she been afforded the

opportunity, she would have told the sentencing jury that Henley was a good brother and that he had been very upset when he could not pay the money he had borrowed against the family farm. According to Robinson, Henley was not a violent person. On cross-examination, Robinson admitted that she had seen the petitioner drink beer and smoke marijuana.

Patricia Woodard, the petitioner's older sister, said that she would have been willing to testify on Henley's behalf had she been contacted by trial counsel. Woodard would have told the jury that the petitioner had taught her to ride a bicycle when they were young, and that she had never seen the petitioner become violent. On cross-examination, Woodard admitted that she had lived in Carthage, Tennessee, for five years prior to the murders and had not spent a great deal of time with the petitioner in the years preceding his arrest and trial.

Cynthia Brown, the petitioner's second wife testified that, had she been contacted by trial counsel, she would have testified in Henley's behalf and told the jury that she had never seen Henley exhibit violent behavior and that he had been very kind to her son by a previous marriage and had intended to adopt the boy. On cross-examination, Brown admitted that Henley drank alcohol and used marijuana during their marriage.

With respect to the petitioner's second claim that trial counsel should have further investigated his mental condition, Henley offered the testimony of attorney Robert Massey who said that trial counsel should have engaged an independent psychologist to assist in the document gathering process and to do an examination of those documents to determine whether or not there would be any mitigation evidence that might be presented from those documents to the jury

at the penalty phase. Mr. Massey had tried one death penalty case at the time of offering this testimony and had settled six others. He had never tried a case in Jackson county, nor had he been acquainted with the petitioner's original trial counsel.

The petitioner also offered the testimony of Dr. William D. Kenner, a psychiatrist who had interviewed Henley once for two hours in August of 1992, reviewed the results of tests administered by a licensed clinical psychologist, reviewed the interviews of family members conducted by post conviction counsel, and reviewed the trial testimony of Henley and co-defendant Flatt. Dr. Kenner had not spoken directly with Henley's family, nor reviewed the entire trial transcript, nor asked Henley to recount what trial counsel had talked about with him. Dr. Kenner did not question Henley's competency to stand trial, but said that Henley had been depressed at the time of the homicides because of his farming failures and may have been "self-medicating" by using alcohol and drugs. On IQ tests given, Dr. Kenner said that Henley had scored in the average range with a performance score of 109, a verbal score of 94, and a full scale score of 99. According to Dr. Kenner, such a divergence between the performance score and the verbal score is often indicative of a learning disability. According to Dr. Kenner, a learning disability could have caused Henley to have difficulty managing his finances and could have been the actual cause of Henley's farming failures. Dr. Kenner also said that because of Henley's close relationship with his grandfather, losing the family farm was the equivalent to Henley of his grandfather dying a second time.

Finally, Henley testified at the post conviction hearing. On direct examination, Henley denied having any meaningful consultation with Reneau. Henley said

that Reneau never asked him for a history of his life or for any personal records such as school or medical records. Henley also said that Reneau had not spoken with any of his family members about testifying at the sentencing hearing. The petitioner admitted that he had never asked his family members to testify in his behalf. Finally, Henley continued to maintain that he was innocent of the crimes for which he had been convicted and sentenced to death.

Upon hearing the proof, the trial judge denied the petition for post conviction relief on all grounds alleged. Though the trial court made no explicit finding with respect to the claim that trial counsel was ineffective because he failed to investigate Henley's mental condition and request an evaluation, with respect to Henley's claim that trial counsel should have prepared more witnesses for the sentencing phase, the trial court stated:

> Heard a lot of witnesses about the sentencing phase. If there's any part of it that really—kind of bothers me a little bit, it's the sentencing phase, and I'll have to state that. I would have like to have had another witness maybe to have been put on. I would like for the mother to have testified when she refused. Now whether he had talked to her two days ahead of time or that day it really doesn't make much difference. If they went in the back room and he talked to her and she still didn't want to testify, maybe she had a reason. Maybe she had a reason then that she doesn't have now, I don't know. I do know this, the attorney asked her. So he come back and got the grandmother and she testified, and I thought did a beautiful job as far as words, the way they read. She answered the questions, she took him through his life, she told it. And the jury had basically everything that these

> witnesses the last two days have talked about in that record before them. They didn't have the numbers of people saying this, but they all knew about his family. They all knew about his grandmother, his granddaddy, they knew all about these things, it was all there. It wasn't repeated over and over by several people, but they did have that in the case when they looked at it. But again, I would have like to have seen another witness or two, but that's trial strategy. He may have thought that's enough. She may have done such a good job that he thought this is the best I'm going to get. That was the choice to make.

The petitioner appealed and the Court of Criminal Appeals held that the evidence preponderated against the trial court's finding that Henley had been afforded his right to effective assistance of counsel at the sentencing phase of the trial. Specifically, the Court of Criminal Appeals found that counsel's failure to adequately investigate and prepare witnesses to testify on Henley's behalf and to adequately investigate Henley's mental condition resulted in a denial of Henley's right to effective assistance of counsel at sentencing. Accordingly, the Court of Criminal Appeal's reversed Henley's death sentence and remanded for a new sentencing hearing.

Thereafter, we granted the State's application for permission to appeal to determine whether the Court of Criminal Appeals erred in concluding that the evidence preponderates against the trial court's finding that Henley was afforded his constitutional right to effective assistance of counsel at the sentencing hearing. For the reasons that follow, we reverse the judgment of the Court of Criminal Appeals and reinstate the judgment of the trial court denying post conviction relief.

STANDARD OF APPELLATE REVIEW

In resolving the issues in this appeal, we are guided by certain well-settled rules. The burden was on the petitioner at the evidentiary hearing to prove his case by a preponderance of the evidence. *Tidwell v. State*, 922 S.W.2d 497, 500 (Tenn.1996); *Cooper v. State*, 847 S.W.2d 521, 527 (Tenn.Crim.App.1992). The findings of fact of the trial judge on a petition for post conviction relief are afforded the weight of a jury verdict and are conclusive on appeal unless the evidence in the record preponderates against those findings. *Tidwell*, 922 S.W.2d at 500; *Cooper v. State*, 849 S.W.2d 744, 746 (Tenn.1993); *Butler v. State*, 789 S.W.2d 898, 899 (Tenn.1990). In evaluating whether the evidence preponderates against the trial court's findings, we are guided by longstanding rules of appellate procedure. Appellate courts in this State do not reweigh or reevaluate the evidence. We can not substitute our inferences for those drawn by the trial judge. Moreover, questions concerning the credibility of the witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the trial judge. Finally, the party seeking to overturn the findings of the trial judge bears the burden on appeal of demonstrating why the evidence contained in the record preponderates against the findings of the trial judge. *Bolin v. State*, 219 Tenn. 4, 11, 405 S.W.2d 768, 771 (1966); *Cooper*, 847 S.W.2d at 527; *Black v. State*, 794 S.W.2d 752, 755 (Tenn.Crim.App.1990). It is with these principles in mind that we evaluate the findings of the trial court and the Court of Criminal Appeals with respect to the petitioner's claim of ineffective assistance of counsel at sentencing.

INEFFECTIVE ASSISTANCE OF COUNSEL

A. Legal Standards

Article I, Section 9 of the Tennessee Constitution provides "that in all criminal prosecutions, the accused hath the right to be heard by himself and his counsel...." Similarly, "the Sixth Amendment[2] to the Constitution of the United States guarantees that in all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense." These constitutional provisions afford to the accused in a criminal prosecution the right to effective assistance of counsel. *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn.1975) and *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To establish a denial of the right, a petitioner bears the burden of proving both that counsel's performance was deficient and that the deficiency prejudiced the defense. *Goad v. State*, 938 S.W.2d 363, 369 (Tenn.1996); *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064.

With respect to the first prong of the claim, we recognized early on that counsel's performance is effective if the advice given or the services rendered are within the range of competence demanded of attorneys in criminal cases. *Baxter*, 523 S.W.2d at 936; *see also, Goad*, 938 S.W.2d at 369. To prove a deficiency, therefore, the petitioner must show that counsel's acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms. *Goad*, 938 S.W.2d at 369; *Strickland*, 466 U.S. at 688, 104 S.Ct. at 2065. When assessing an attorney's performance it is not our function to "second guess" tactical and strategic choices

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[2] The Sixth Amendment is applicable to the states through the Fourteenth Amendment. *See Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

pertaining to defense matters or to measure a defense attorney's representation by "20-20 hindsight." *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn.1982). As the United States Supreme Court has recognized,

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

Strickland, 466 U.S. at 689, 104 S.Ct. at 2065; *see also Burger v. Kemp*, 483 U.S. 776, 789, 107 S.Ct. 3114, 3123, 97 L.Ed.2d 638 (1987). When reviewing the facts and circumstances of a case, therefore, a "fair assessment ... requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065; *see also Goad*, 938 S.W.2d at 369.

To establish the second prong of the claim—that counsel's deficiency resulted in prejudice to the defense—a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068; *see also Goad*, 938 S.W.2d at 370. When challenging a death sentence, a petitioner must show that "there is a reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695, 104 S.Ct. at 2069.

In determining whether a petitioner has discharged the burden of establishing prejudice, a court

> must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated trivial effect....

Strickland, 466 U.S. at 696-97, 104 S.Ct. at 2069; *see also Goad*, 938 S.W.2d at 371. Where, as here, the alleged deficiency involves counsel's failure to present mitigating evidence in the penalty phase of a capital trial, in assessing prejudice under *Strickland*, several factors are significant, including whether substantially similar mitigating evidence was presented to the jury in either the guilt or penalty phase of the proceedings; the nature and extent of the mitigating evidence that was available but not presented; and whether there was such strong evidence of aggravating factors that the mitigating evidence would not have affected the jury's determination. *Goad*, 938 S.W.2d at 371 (citing cases).

Because a petitioner must establish both prongs of the test to prevail on a claim of ineffective assistance of counsel, failure to prove either deficient performance or resulting prejudice provides a sufficient basis to deny relief on the claim. Indeed, a court need not address the components in any particular order or even address both if the defendant makes an insufficient showing of one component. *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069; *Goad*, 938 S.W.2d at 370.

Applying the principles outlined above, we must now determine whether the evidence in the record preponderates against the trial court's finding that the petitioner failed to establish that he was denied his constitutional right to effective assistance of counsel.

B. Failure to Prepare/Call Other Witnesses

Though the trial court did not use the term, it is evident from its finding that the trial court concluded that the petitioner had failed to establish prejudice resulting from counsel's alleged failure to prepare and call witnesses. In denying post conviction relief, the trial judge observed that the sentencing jury "had basically everything that these witnesses the last two days have talked about in that record before them."

In reversing the decision of the trial court, the Court of Criminal Appeals stated, "[w]e do not think it is assuming too much to conclude that a jury is going to be prejudiced against a defendant upon that person's own mother refusing to testify on his or her behalf." As evidence of prejudice, the intermediate court quoted from the affidavit of a juror which was submitted as part of the petitioner's offer of proof at the post conviction hearing in which the juror said, "If a man's own mother won't testify on his behalf then we know what we've got to do." In addition, the intermediate court stated that, "[e]ven without this offer of proof, we hold that the dearth of favorable testimony offered at the sentencing hearing, when significant amounts of favorable testimony were available establishes a reasonable probability that, but for Mr. Reneau's deficient performance with respect to the sentencing hearing of Henley's trial, the result of the proceeding would have been different."

Initially we note that the juror's affidavit statement regarding the effect on the sentencing jury of Dorothy

Henley's failure to testify should not have been considered by the intermediate appellate court as proof of prejudice. Indeed, the affidavit should not have been considered for any purpose. Rule 606(b) of the Tennessee Rules of Evidence, expressly prohibits a juror from testifying or offering an affidavit "as to any matter or statement occurring during the course of the jury's deliberations *or to the effect of anything upon any juror's mind or emotion as influencing that juror to assent to or dissent from the verdict* ..." (Emphasis added.) In this case, the juror's affidavit related to the precise subject matter about which a juror is strictly forbidden from testifying by Rule 606(b)—the effect of the mother's failure to testify on the jury verdict. The affidavit violates the express terms of Rule 606(b) and should not have been considered by the intermediate court as evidence of prejudice. *See State v. Stephenson*, 878 S.W.2d 530, 554 (Tenn.1994)

Moreover, Henley's mother did not refuse to testify in the presence of the jury. Instead, she asked to first speak with trial counsel. Although the record reflects that she thereafter did not testify, at no time did she openly refuse to testify on Henley's behalf in the presence of the jury as the Court of Criminal Appeals decision indicates. In addition, the fact that the jury was not provided with an explanation as to why Dorothy Henley did not testify does not justify a finding of prejudice. The jury was instructed to base its sentencing decision on the evidence presented at trial, not upon speculation about why a particular witness did not testify. Jurors are presumed to follow the instructions given them in arriving at a verdict. *State v. Laney*, 654 S.W.2d 383, 389 (Tenn.1983); *State v. Blackmon*, 701 S.W.2d 228, 233 (Tenn.Crim.App.1985). Therefore, it is not appropriate to "assume" the defense was prejudiced because

Henley's mother was not called as a witness in his behalf at the sentencing hearing. The fact that Dorothy Henley asked to speak with counsel when called as a witness and thereafter did not testify does not constitute a reasonable probability sufficient to undermine confidence in the outcome of the proceeding

Finally, the record does not support the Court of Criminal Appeals' statement that prejudice was established because there was a "dearth of favorable testimony offered at the sentencing hearing, when significant amounts of favorable testimony were available." As was previously stated, when assessing the existence of prejudice in the face of an alleged deficiency involving counsel's failure to present mitigating evidence in the penalty phase of a capital trial, we consider whether substantially similar mitigating evidence was presented to the jury in either the guilt or penalty phase of the proceedings; the nature and extent of the mitigating evidence that was available but not presented; and whether there was such strong evidence of aggravating factors that the mitigating evidence would not have affected the jury's determination. *Goad*, 938 S.W.2d at 371 (citing cases).

In this case, the record fully supports the trial court's statement that, through the testimony of Bertha Henley and the petitioner, the original sentencing jury had before it basically the same favorable mitigation evidence that was offered by the many witnesses at the evidentiary hearing on the post conviction petition. As previously summarized herein, the jury heard extensive testimony about Henley's relationship with his grandparents, including his own testimony that he loved them more than anyone else in the world. It is difficult to imagine a more favorable and detailed description of the petitioner's character than that given by Bertha Henley. It is clear from the

proof at trial and the evidentiary hearing in this case that the petitioner had a closer relationship with his grandmother, Bertha Henley, than with any other living family member. Indeed, the petitioner's own mother acknowledged that she could have offered no further information about Henley and his life than that given by Bertha Henley at the sentencing hearing.

Dorothy Henley admitted that in the years preceding the murders she had resided in Davidson County and had little contact with her son. On cross-examination, Dorothy Henley also admitted that she visited her son only a few times in jail before his trial. Overall, Dorothy Henley used very general terms to describe her relationship with her son. Similarly, Henley's older sister gave only general information about the petitioner, and conceded that she had little contact with her brother during the five years preceding the homicides.

While Henley's younger sister and second wife had closer associations with him near the time of the murders, both also had personal knowledge about his use of drugs, specifically marijuana, which was brought out during cross-examination at the evidentiary hearing. Had these two witnesses testified at the sentencing hearing, that same information, no doubt, would have been brought to light. In view of Henley's testimony throughout the trial that he had never abused drugs, the testimony of two family members to the contrary would have been extremely detrimental to the defense.

The only other testimony offered at the evidentiary hearing was that of Henley's children who claimed they would have testified had trial counsel contacted their mother with whom they were residing. However the children, eleven and thirteen years old at the time of

the trial, admittedly were not informed about the trial until its conclusion.

Therefore, the witnesses which were available but not called as witnesses at the original trial, would have offered general, vague testimony about the petitioner's character, and the evidence regarding the petitioner's use of drugs and alcohol was unfavorable. Moreover, none of these witnesses had a particularly close relationship with the petitioner near the time of the killings. In contrast, the mitigating proof actually presented was detailed, poignant, and favorable and was provided by the petitioner and his grandmother, with whom he had a close relationship. It is significant that the State did not cross examine either the petitioner or his grandmother at the sentencing hearing.

Clearly, trial counsel has a duty to investigate and prepare for the penalty phase of a capital trial since "evidence about the defendant's background and character is relevant because of the belief ... that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems may be less culpable than defendants who have no such excuse." *California v. Brown*, 479 U.S. 538, 544, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987). However, in this case, the proof does not preponderate against the trial court's finding that the petitioner suffered no prejudice even assuming trial counsel failed to competently fulfill that duty. Nothing was adduced at the post conviction hearing which could possibly have added anything favorable to the mitigation proof that was offered at the original trial by the petitioner and his grandmother. Though the petitioner offered a large number of witnesses who claimed they would have testified on his behalf at the sentencing hearing but for counsel's incompetence, the

quality of their testimony was weakened either by their limited relationship with Henley at the time of the murders or by their personal knowledge of his drug use at the time of the murders. As the trial judge implicitly found, the testimony offered at the post conviction hearing was, at most, cumulative. *State v. Melson*, 772 S.W.2d 417, 419 (Tenn.1989). Appellate courts must consider the quality of the proposed testimony rather than the quantity of witnesses when determining whether prejudice has been established. Finally, proof of the aggravating circumstance in this case, that the murders were "especially heinous, atrocious, or cruel in that it involved torture or depravity of mind," Tenn.Code Ann. § 39-2-203(I)(5) (1982), was strong. The victims were forced at gunpoint from the road to their home. The wife watched as her husband was shot. She was then shot several times, but, according to the testimony at trial, she remained alive and conscious for a time after the fire had begun, and actually died of smoke inhalation. In our view, the petitioner has not established the existence of a "reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695, 104 S.Ct. at 2069.

C. Failure to Investigate Mental Condition and Request Evaluation

The Court of Criminal Appeals also found that the evidence preponderates against the trial court's denial of Henley's claim that counsel inadequately investigated the petitioner's mental condition and failed to request a mental evaluation.

At the evidentiary hearing, Henley offered the testimony of Dr. Kenner who said that Henley lost the family farm because he had a learning disability and

was a bad manager and that Henley was depressed about the loss of the family farm and was "self-medicating" with alcohol and drugs near the time of the homicides. Based upon Dr. Kenner's testimony, Henley claimed that had trial counsel properly investigated his mental condition and requested that he undergo a mental evaluation, Reneau would have learned of this mitigating proof and presented it at the sentencing hearing. In reversing the trial court's denial of relief, the Court of Criminal Appeals implicitly found that trial counsel had been deficient in failing to investigate and offer this proof and that the deficiency has resulted in prejudice to Henley. We disagree.

While it is true that often a greater duty of inquiry into a client's mental health is imposed for the penalty phase of a capital trial, *Goad*, 938 S.W.2d at 370, it is also well-established that

> the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions ... And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.

Strickland, 466 U.S. at 691, 104 S.Ct. at 2066.

At the trial of this case, the defendant maintained his innocence, flatly denied that he had been intoxicated on the day of the murders, and also denied ever abusing drugs. Moreover, Henley said his farming operation had failed because of unpredictable weather, a drought followed the next year by floods. Clearly then, the evidence for which trial counsel is now faulted for not discovering and introducing would

have been inconsistent with the defendant's own testimony and harmful to the defense theory throughout the trial. When assessing the performance of trial counsel, courts must eliminate the "distorting effects of hindsight" and evaluate the challenged conduct from *counsel's* perspective at the time, rather than from the perspective of a mental health expert offering testimony in a post conviction proceeding. Applying that standard, it is clear that trial counsel's performance and investigation of Henley's mental condition was not deficient. Accordingly, the evidence does not preponderate against the trial court's denial of post conviction relief.

CONCLUSION

After carefully reviewing the record, we have determined that the Court of Criminal Appeals erred in concluding that the evidence preponderates against the trial court's denial of post conviction relief. Accordingly, the judgment of the Court of Criminal Appeals reversing Henley's death sentence and ordering a new sentencing hearing is reversed, and the judgment of the trial court denying the petition for post conviction relief is reinstated. The sentence of death shall be carried out as provided by law on the 27th day of April, 1998, unless stayed by this Court or other appropriate authority.

ANDERSON, C.J., and HOLDER, J., concur.

REID and BIRCH, JJ., dissent with separate dissenting opinion.

REID, Justice, dissenting.

I dissent from the majority's decision that the petitioner in this case received effective assistance of counsel.

Even though the trial court denied the petition for relief, that court obviously was not pleased with counsel's performance and attributed counsel's failure to call any witnesses other than petitioner's grandmother to "trial strategy." In announcing his decision, the court stated: "I would have liked to have had another witness maybe to have been put on. I would have liked for the mother to have testified when she refused." And again: "I would have liked to have seen another witness or two, but that's trial strategy."

The Court of Criminal Appeals found that counsel's performance at the sentencing phase of the trial was deficient and also prejudicial, and the case was remanded by that court to the trial court for a new sentencing hearing. In support of my dissent, I rely upon the following portions of the Court of Criminal Appeals' opinion, which was written by Judge John H. Peay, with Presiding Judge Joe B. Jones and Special Judge Joseph H. Walker concurring:

With respect to the sentencing phase of the trial, however, we find that Mr. Reneau's investigation and preparation were constitutionally deficient. Our Court has recognized that

> '[a] lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing. This cannot effectively be done on the basis of broad general emotional appeals or on the strength of statements made to the lawyer by the defendant. Information concerning the defendant's background, education, employment record, mental and emotional stability, family relationships, and the like, will be relevant, as will mitigating circumstances surrounding the commission of the offense itself. Investigation is essential to fulfillment of these functions.'

Adkins v. State, 911 S.W.2d 334, 356 (Tenn.Crim.App.1994) (citation omitted). Personal background and character information are highly relevant at a capital sentencing hearing "because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *California v. Brown*, 479 U.S. 538, 545, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987) (O'Connor, J., concurring).

Although many of Henley's family members, including his mother, testified at the post-conviction hearing that they would have been willing to testify on Henley's behalf had they been asked, Mr. Reneau spoke to none of them prior to the sentencing hearing. Mr. Reneau called the petitioner's mother to the stand at the sentencing hearing without ever having spoken to her about testifying. Not understanding what was expected of her, she refused—in front of the jury—to testify. We do not think it is assuming too much to conclude that a jury is going to be prejudiced against a defendant upon that person's own mother refusing to testify on his or her behalf.[1]

Had they been prepared and called at the sentencing hearing, Henley's family members would have testified that they loved the petitioner; that he was a good and loving man; that he was not a violent man; that the offenses of which he was convicted were totally out of character for him; and that they were shocked by his arrest. They would have pled for his life. Additionally, the petitioner produced evidence at

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[1] In the petitioner's offer of proof at the post-conviction hearing, one juror was quoted as saying, "If a man's own mother won't testify on his behalf then we know what we've got to do."

the post-conviction hearing that other potentially mitigating evidence existed that would have been discovered had Mr. Reneau conducted a more thorough investigation. Expert testimony indicated the possibility that Henley had suffered from depression, alcohol and drug abuse, and learning disabilities. In grade school, Henley's I.Q. tested at 89. He dropped out of high school after the tenth grade. Not long before the murders, Henley suffered severe financial losses, was forced to file bankruptcy, and lost the family farm. All of this would have been proper testimony for mitigation. *Eddings v. Oklahoma*, 455 U.S. 104, 117, 102 S.Ct. 869, 878, 71 L.Ed.2d 1 (1982) (the Constitution requires the sentencer to "consider and weigh all of the mitigating evidence concerning the petitioner's family background and personal history.") (O'Connor, J., concurring); *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

In spite of all the mitigating evidence available, only two people testified on Henley's behalf at the sentencing hearing: Henley himself and his grandmother. The jury had already indicated that it did not believe Henley when it convicted him. Accordingly, it is reasonable to presume that Henley's testimony at his sentencing hearing would not have been particularly persuasive. It is also possible, if not likely, that Henley's grandmother was viewed with a certain amount of hostility because Flatt testified that it was on her behalf that Henley had felt compelled to attack the Staffords. Thus, of all the people that Mr. Reneau had available to him, the only two that testified were arguably the two least helpful.

"When the record shows a substantial deficiency in investigation, the normal deference afforded trial counsel's strategies is particularly inappropriate.... [This] Court will not credit a strategic choice by

counsel when counsel 'did not even know what evidence was available.' " *Cooper v. State*, 847 S.W.2d at 530 (citation omitted). The record in this case shows such a substantial deficiency. No psychological or psychiatric evaluation was done on Henley. Other than Henley's grandmother, Mr. Reneau did not speak with Henley's family members prior to the sentencing hearing. There is no evidence from Mr. Reneau's file or otherwise that he investigated Henley's educational background, employment history, or that he spoke with members of the community familiar with Henley. He " 'should have investigated his background, checked his school records, ... his medical history, tried to find witnesses to demonstrate all aspects of his character. [He] should have requested a psychological evaluation.' " *Bell v. State*, No. 03C01-9210-CR-00364, p. 42, Hamilton County, 1995 WL 113420 (Tenn.Crim.App. filed March 15, 1995, at Knoxville), *cert. denied*, (quoting the court below).

While we have held that Mr. Reneau's failure to investigate his client's mental health was not ineffective assistance of counsel with respect to the guilt phase of this trial, we do find that it was ineffective with respect to the sentencing phase.

> "[T]here is a qualitative difference between obtaining psychological information for the purpose of preparing a defense to the charges and using such evidence for the purpose of mitigating the punishment. Thus, it is not incompatible to present evidence of psychological or mental impairment during sentencing, even where a defense of factual innocence has been interposed at the guilt phase."

Bell v. State, supra, at 46, 1995 WL 113420 (citation omitted). Combined with Mr. Reneau's failure to investigate Henley's family's availability and willingness to testify, and his failure to investigate

other aspects of Henley's past, Mr. Reneau failed to meet the level or competence required by attorneys representing clients at the sentencing phase who are faced with the death penalty. *See State v. Terry*, 813 S.W.2d 420, 425 (Tenn.1991) (the qualitative difference between the death penalty and all other punishments requires greater reliability in the sentencing determination).

We also find that Mr. Reneau's deficient performance at the sentencing phase prejudiced the petitioner. The petitioner made an offer of proof at the post-conviction hearing that the jury considered the fact that Henley's mother refused to testify on her son's behalf. Even without this offer of proof, we hold that the dearth of favorable testimony offered at the sentencing hearing, when significant amounts of favorable testimony were available, establishes a reasonable probability that, but for Mr. Reneau's deficient performance with respect to the sentencing phase of Henley's trial, the result of the proceeding would have been different.[2]

This well reasoned opinion by the Court of Criminal Appeals compels the conclusion that the petitioner was denied effective assistance of counsel guaranteed by the state and federal constitutions and therefore is entitled to a new sentencing hearing.

I am authorized to state that Justice BIRCH joins in this Dissenting Opinion.

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[2] Unlike *State v. Melson*, 772 S.W.2d 417 (Tenn.1989), this was not a case where the available mitigation evidence had already been presented during the guilt phase of the petitioner's trial.

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT NASHVILLE

STEVE HENLEY,	)	
	)	
Appellant,	)	C.C.A. No. 01C01-
	)	9908-CR-00307
VS.	)	JACKSON COUNTY
	)	
STATE OF TENNESSEE	)	FILED
	)	OCT 5 1999
Appellee.	)	[illegible]

ORDER

This matter is before the Court upon the petitioner's application from the trial court's denial of his motion to reopen his post-conviction petition pursuant to T.C.A. § 40-30-217. The state opposes the application. In his application, the petitioner raises the following issues:

1. Whether the trial court's instructions on the meaning of "reasonable doubt" lessened the state's burden of proof at both the guilt and sentencing phases of the trial.
2. Whether the petitioner is entitled to relief based on a claim of discrimination against women in the selection of the grand jury foreperson.
3. Whether the jury found an invalid aggravating circumstance.

4. Whether the jury was misled into believing that mitigating circumstances had to be found unanimously at the sentencing phase.

5. Whether the jury should have been instructed on the effect of a non-unanimous verdict at the sentencing phase.

6. Whether the death penalty constitutes cruel and unusual punishment as a result of the length of time the petitioner has been incarcerated on death row.

Relief under T.C.A. § 40-30-217(a) may only be granted where (1) the claim in the motion is based upon a final ruling of the highest state appellate court or the United States Supreme Court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required and the motion is filed within one year of the ruling; or (2) the claim in the motion is based upon new scientific evidence establishing that the petitioner is actually innocent of the offense or offenses for which the petitioner was convicted; or (3) the claim asserted in the motion seeks relief from a sentence that was enhanced because of a previous conviction and such conviction in the case in which the claim is asserted was not a guilty plea with an agreed sentence and the motion is filed within one year of the finality of the ruling holding the previous conviction to be invalid; and (4) it appears that the facts underlying the claim, if true, would establish by clear and convincing evidence that the petitioner is entitled to have the conviction set aside or the sentence reduced. Moreover, in reviewing the denial of a motion to reopen, this Court shall not grant the application unless it appears that the trial court abused its discretion in denying the motion. T.C.A. § 40-30-217(c).

Having reviewed the petitioner's application, the attached pleadings, and the state's response, the Court finds that the trial court did not abuse its discretion in denying his motion to reopen and that the application for permission to appeal should be denied.

I. Reasonable Doubt Jury Instruction

First, the petitioner contends that the jury instructions given on reasonable doubt were unconstitutional. While conceding that the Tennessee courts have rejected his argument, he contends that granting relief on this claim would establish a "constitutional right that was not recognized as existing at the time of trial." T.C.A. § 40-30-217(a)(1). The Court rejects this argument.

In Victor v. Nebraska, 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994), the United States Supreme Court expressed criticism of the continued use of the "moral certainty" phrase, however, the Court did not actually hold it to be constitutionally invalid. Instead, the Court looked to the full jury charge to determine if the phrase was placed in such a context that a jury would understand that it meant certainty with respect to human affairs. Id. at 13-17, 114 S.Ct. at 1247-48. In particular, the Supreme Court was concerned with use of the terms "grave uncertainty" and "actual substantial doubt." Cage v. Louisiana, 498 U.S. 39, 41, 111 S.Ct. 328, 329-30,112 L.Ed.2d 339 (1990).

In this case, it does not appear that the terms of particular concern to the United States Supreme Court were included in the charge. As conceded by the petitioner, this Court has upheld similar instructions as consistent with constitutional principles. See Pettyjohn v. State, 885 S.W.2d 364, 365-66 (Tenn. Crim. App. 1994); State v. Hallock, 875 S.W.2d 285, 294 (Tenn.

Crim. App. 1993). Moreover, our Supreme Court has held that "[t]he use of the phrase 'moral certainty' by itself is insufficient to invalidate an instruction on the meaning of reasonable doubt." State v. Nichols, 877 S.W.2d 722, 734 (Tenn. 1994), and more recently, the constitutionality of this jury instruction was upheld in Austin v. Bell, 126 F.3d 843,845-47 (6th Cir. 1997), cert. denied, __ U.S. __,118 S.Ct. 1526, 140 L.Ed.2d 677 (1998).

II. Exclusion of Women as Grand Jury Foreperson

The petitioner contends that in Campbell v. Louisiana, 523 U.S. 392, 118 S.Ct. 1419, 140 L.Ed.2d 551 (1998), the Supreme Court created a new constitutional right. Specifically, he submits that in Campbell, the United States Supreme Court held that a male has standing to contest discrimination against women in the selection of the grand jury and the grand jury foreperson.

In State v. Meadows, 849 S.W.2d 748, 754 (Tenn. 1993), our Supreme Court stated that "a case announces a new rule if the result was not dictated by precedent existing at the time the defendants conviction became final." Id. at 751 (quoting Teague v. Lane, 489 U.S. 288, 301, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (emphasis in original)). Formerly, under State v. Coe, 655 S.W.2d 903 (Tenn. 1983), a male did not have standing to contest the systematic exclusion of women from the grand jury. Accordingly, it appears that a new constitutional right was created by the Supreme Court in Campbell.

Next, this Court must determine whether retroactive application is required. A new rule of federal constitutional law must be given retroactive application to cases on collateral review where: (1) the

rule places certain kinds of primary, private individual conduct beyond the power of the state to proscribe, or (2) the rule requires the observance of procedures implicit in the concept of ordered liberty. Teague v. Lane, 489 U.S. at 307, 109 S.Ct. at 1073. In the present case, the decision which the petitioner claims sets forth a new constitutional rule requiring retroactive application is federal. Thus, we must apply the federal retroactivity analysis. See Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 364-65, 53 S.Ct. 145, 148-49, 77 L.Ed. 360 (1932).

As pointed out by the state, this analysis was performed by the 6th Circuit Court of Appeals in Coe v. Bell, 161 F.3d 320 (6th Cir. 1998), petition for cert. filed (U.S. May 24, 1999) (No. 98-9606), in which the Court determined that retroactive application of Campbell v. Louisiana was barred by Teague, 161 F.3d at 355. We agree with this determination.

III. Validity of Aggravating Circumstance Found by the Jury

The petitioner submits that the jury failed to find a valid aggravating circumstance in sentencing him to death by electrocution. Specifically, the petitioner submits that the jury wrote "[w]e the jury found the following statutory aggravating circumstances Atrocious Cruel Torture." As authority for his position, the petitioner cites to State v. Harris, 989 S.W.2d 307 (Tenn. 1999), as creating a new constitutional right.

In Harris, the issue raised on appeal was whether the jury's incomplete verdict regarding the heinous, atrocious, or cruel aggravating circumstance was harmless error in a non-capital case. In reviewing the issue, the Supreme Court noted that the jury's

incomplete finding with respect to the heinous, atrocious, or cruel aggravating circumstance would have implicated constitutional vagueness concerns had the jury imposed a sentence of death. Id. at 316. From a complete reading of Harris, it is clear that the Supreme Court was not creating a new rule of constitutional law. Instead, the Supreme Court was merely reiterating the constitutional principles set forth in Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 1764, 64 L.Ed.2d 398 (1980). Moreover, the petitioner raised this complaint on direct appeal, and our Supreme Court rejected it. See State v. Henley, 774 S.W.2d 908, 917 (Tenn. 1989).

IV. Jury Instruction on Mitigating Circumstances

The petitioner contends that the jury charge misled the jury into believing that mitigating circumstances had to be found unanimously. While conceding that this issue has been decided adversely by Tennessee courts, the petitioner urges this Court to establish a new rule in this case. Our courts have repeatedly held that the instructions do not misled the jury. See State v. Thompson, 768 SW.2d 239, 251-52 (Tenn. 1989); State v. Bates, 804 S.W.2d 868, 883 (Tenn. 1991). As an intermediate appellate court, it is our duty to apply the law as promulgated by the legislature or as announced by our Supreme Court.

V. No Instruction on Effect of Lack of Unanimity

Next, the petitioner contends that this Court should acknowledge the constitutional infirmity arising from the jury being precluded from knowing that the effect of a non-unanimous verdict is a life sentence. As noted by the petitioner, this argument has been repeatedly rejected by our Supreme Court. See State v. Brimmer, 876 S.W.2d 75, 87 (Tenn. 1994); State v. Cazes, 875

S.W.2d 253, 268 (Tenn. 1994); State v. Smith, 857 S.W.2d 1, 22-23 (Tenn. 1993); State v. Barber, 753 S.W.2d 659, 670-71 (Tenn. 1988). As previously stated, it is the duty of this Court to apply the law as promulgated by the legislature or as announced by our Supreme Court. Furthermore, as conceded by the petitioner, this issue was adversely decided by the United States Supreme Court on a federal claim in Jones v. United States, __.U.S. __, 119 S.Ct. 2090, 2098-99 (1999).

VI. Cruel and Unusual Punishment

Finally, the petitioner contends that his sentence constitutes cruel and unusual punishment due to his lengthy incarceration on death row. Under T.C.A. § 40-30-217(a)(1), relief may only be granted where the claim in the motion is based upon a final ruling of the highest state appellate court or the United States Supreme Court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required and the motion is filed within one year of the ruling. On this issue, the cases cited by the petitioner are not the opinions of our Supreme Court or of the United States Supreme Court. Nor do the other considerations set forth in T.C.A. § 40-30-217(a) apply.

Having reviewed the petitioner's application, the attached pleadings, and the state's response, we find that the application before this Court is not well taken.

IT IS, THEREFORE, ORDERED that the petitioner's application for permission to appeal the trial court's denial of his motion to reopen his post-conviction petition is denied. The petitioner being indigent, costs are taxed to the state.

/s/ DAVID H. WELLES
DAVID H. WELLES, JUDGE

CONCUR:

/s/ JOHN H. PEAY
JOHN H. PEAY, JUDGE

/s/ THOMAS T. WOODALL
THOMAS T. WOODALL, JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

STEVE HENLEY, Petitioner,	)	
v.	)	No. 3:98-0672 Judge Echols
RICKY BELL, Warden, Riverbend Maximum Security Institution, Respondent.	)	

MEMORANDUM

Presently pending before the Court are (1) Petitioner's Amended Petition for Writ of Habeas Corpus and a request for discovery and an evidentiary hearing (Docket No. 53), to which Respondent filed an Answer; (2) Respondent's Motion for Summary Judgment (Docket Entry No. 55), to which Petitioner responds in opposition; and Respondent (Docket No. 112) limited to a narrow issue pursuant to Court Order (Docket No. 105).

I. FACTUAL BACKGROUND

Based on the evidence presented at trial in state court, the following are the facts of the case for the underlying charges and conviction of Steve Henley ("Petitioner"). On July 25, 1985, Petitioner and Terry Flatt were riding around together in Petitioner's truck attending to Petitioner's business errands. At trial Flatt testified that both he and Petitioner had been

drinking beer and taking Dilaudid, a narcotic pain medication, throughout the day. Around 6:00 p.m., they drove up a gravel road heading toward Petitioner's grandmother's house, which was on the same road, but beyond the residence of the victims Fred and Edna Stafford, an elderly couple who were neighbors of Petitioner's grandmother. Flatt testified that Petitioner dropped him off at a little bridge just before Petitioner's grandmother's house, but after the Stafford's residence, and returned to pick him up about five to ten minutes later. Flatt testified that when Petitioner returned, Petitioner had a .22 rifle in the cab of the truck. According to Flatt, Petitioner then drove up the road about fifty to seventy-five yards, stopped the truck, and got out to load more shells into the .22 rifle and to fill up a plastic jug with gasoline from the five gallon gas can that was in the back of the truck-bed.

Flatt testified that after getting back into the truck, Petitioner drove toward the residence of Fred and Edna Stafford without saying anything. When Flatt and Petitioner reached the Stafford's home, the Staffords were outside by the road. According to Flatt, Petitioner got out of the truck and told the Staffords that Flatt would kill him if they did not give him money. Petitioner told Flatt to bring the .22 rifle as he ordered the Staffords to walk up the driveway toward their home.

Flatt testified that as they all got near the Stafford residence, Petitioner took the rifle away from him and told Flatt to go back to the truck and get the plastic jug filled with gasoline. Flatt did as he was instructed, while Petitioner and the Staffords entered the house. As Flatt was returning to the house with the gasoline, he saw Petitioner shoot Mr. Stafford with the rifle. Petitioner next shot Mrs. Stafford with the rifle and

then took out a pistol and shot her "a time or two." Flatt testified that after shooting the Staffords, Petitioner told him to pour out the gasoline. Flatt poured out a small amount and then stopped, saying that he could not do it. Flatt testified that Petitioner took the plastic jug away from him, finished pouring out the gasoline, and told him to light it. Flatt refused, so Petitioner struck a match and set the Stafford's residence ablaze.

Petitioner and Flatt then ran out to Petitioner's truck and drove away. While driving, Petitioner pulled a wad of money out of a pocket and told Flatt to count it. Flatt testified that the wad totaled $131.00 and that Petitioner only had about $12.00 earlier in the day. After driving some distance, Petitioner stopped the truck, jumped out, and threw the rifle and pistol off to the side of the road and then drove on down the road.

A nearby neighbor who saw the smoke reported the fire, but the Stafford's home was totally burned. Only portions of the Stafford's bodies were recovered. However, sufficient remains existed to establish that Mr. Stafford died of a bullet wound through the heart and Mrs. Stafford died of burns and inhalation of noxious gases.

Pursuant to a plea bargain agreement, Flatt pled guilty to two counts of second-degree murder, two counts of armed robbery, and one count of aggravated arson. Flatt was sentenced to concurrent sentences of twenty-five years for each of the murders, ten years for each of the robberies, and ten years for the arson.

At trial, Petitioner admitted that he had spent the day with Flatt, but he denied taking any Dilaudid or being intoxicated with alcohol. He testified that he had asked Flatt to get out of his truck on the way to his grandmother's house because Flatt was intoxicated

and that Flatt had taken Petitioner's .22 rife to hunt while waiting for Petitioner to return. Petitioner adamantly denied killing the Staffords and setting their home ablaze.

II. PROCEDURAL HISTORY

In 1986 Petitioner was convicted of one count of aggravated arson and two counts of first degree premeditated murder for the killings of Fred and Edna Stafford. The jury sentenced Petitioner to death for both murders, finding that each murder was "especially heinous, atrocious, or cruel in that it involved torture or depravity of mind." Tenn. Code Ann. § 39-2-203(I)(5)(1982). On direct appeal, the Tennessee Supreme Court affirmed the convictions and sentence. State v. Henley, 774 S.W.2d 908 (Tenn. 1989), denial of post-conviction relief rev'd, in part, by, No. 01C01-9506-CC-00193, 1996 WL 234075 (Tenn. Crim. App. May 9, 1996), rev'd, 960 S.W.2d 572 (Tenn. 1997). The United States Supreme Court denied certiorari on June 28, 1990.

Petitioner filed his initial petition for post-conviction relief with the trial court in October 1990 and an amended petition in August 1994. Following an evidentiary hearing, the trial court denied his petition on all grounds alleged. On appeal, the Tennessee Court of Criminal Appeals ruled on May 9, 1996, that Petitioner had been denied his right to effective assistance of counsel at the sentencing phase of his trial because his counsel failed to: (1) present sufficient mitigating testimony from Petitioner's family members, and (2) failed to investigate Petitioner's mental condition adequately and request that he undergo a mental evaluation. 1996 WL 234075, at *11–*12. The court vacated Petitioner's death sentence and ordered a new sentencing hearing. Id. at *13. On December 15, 1997, however, the Tennessee Supreme

Court reversed the Court of Criminal Appeals and reinstated Petitioner's death sentence. 960 S.W.2d 572. The Tennessee Supreme Court found: (1) no deficient performance by Petitioner's trial counsel for failure to investigate Petitioner's mental condition because such evidence would have been inconsistent with Petitioner's own trial testimony and harmful to the defense theory, and (2) sufficient mitigating evidence was presented by Petitioner's grandmother during the sentencing phase and nothing adduced at the post-conviction hearing from other potential witnesses would have added anything favorable to the mitigation proof that Petitioner's grandmother offered at the original trial. Id. at 580–83.

On April 20, 1999, Petitioner filed a motion to re-open his state post-conviction petition, which the trial court denied on August 18, 1999. Addendum No. 29 and 31. Petitioner appealed the denial to the Tennessee Court of Criminal Appeals on September 1, 1999. Addendum No. 31. That court denied Petitioner's appeal on October 5, 1999. Addendum No. 30.

Petitioner filed his initial Petition for Writ of Habeas Corpus with this Court on July 23, 1998. (Docket No. 1). He then filed a Motion for Discovery (Docket No. 17) which this Court granted in part on June 14, 1999 (Docket No. 33). On November 1, 1999, Petitioner filed an amended habeas petition. (Docket No. 53). Respondent filed the pending Motion for Summary Judgment on December 3, 1999 (Docket No. 55), to which Petitioner filed a response on May 22, 2000 (Docket No. 92). Respondent did not file a reply to Petitioner's response brief.

Subsequently, Petitioner filed an Ex Parte Motion for Expert Assistance, which requested that this Court fund various experts, including a psychiatrist/psychologist, to respond to Respondent's

Motion for Summary Judgment and more fully present his case to the Court. (Docket No. 68). The Court denied Petitioner's Motion on February 14, 2000, concluding that Petitioner had not shown good cause why discovery should be allowed. (Docket No. 75).

On February 25, 2000, Petitioner filed a Motion for Reconsideration, contending that the Court misunderstood the nature of Petitioner's Motion and incorrectly applied Habeas Corpus Rule 6. (Docket No. 76). The Court granted Petitioner's request for some experts (Docket No. 97), including a pharmacological expert to support his claim that he was unconstitutionally administered mind-altering drugs throughout the course of his trial. However, once again the Court denied funding for a psychiatrist/psychologist to support Petitioner's claims that his attorney was ineffective by not discovering and introducing evidence of his mental state for the purposes of establishing a defense at the guilt phase of Petitioner's trial and a mitigating factor at the sentencing phase.

On April 26, 2001, Petitioner submitted a Supplemental Response and Supplemental Authorities (Docket No. 99) to Respondent's Motion for Summary Judgment. Petitioner sought to introduce: (1) new evidence in support of his argument that he was unconstitutionally medicated by the State with mind-altering drugs during his trial in violation of due process, and (2) five supplemental authorities to support his ineffective assistance of counsel claim.

Respondent moved to strike Petitioner's supplemental response and authorities. (Docket No. 100). On April 1, 2002, the Court granted Respondent's Motion to Strike (Docket No. 104) because the record showed that Petitioner's counsel failed to diligently develop his unconstitutional

medication claim during his post-conviction hearing, and Petitioner's supplemental authorities were inapplicable to the circumstances of his case.

On February 10, 2003, the Court ordered the parties to file supplemental responses limited to showing cause and prejudice or a fundamental miscarriage of justice on the sufficiency of the evidence to establish the required mental state for a first degree murder charge. (Docket No. 105). On February 14, 2003, Petitioner filed a Motion to Reconsider the Court's Order in which he requested an extension of time to file his supplemental response. (Docket No. 106). That same day, Petitioner also filed a Notice of Supplemental Authority related to his claims of false testimony and improperly withheld exculpatory evidence. (Docket No. 107).

On February 21, 2003, the Court denied Petitioner's request for an extension because Petitioner failed to show cause for an extension. (Docket No. 108). On February 24, 2003, the Court denied Petitioner's Motion to Reconsider because Petitioner failed to establish that the Court made an error of law when it issued its Order of February 10, 2003. (Docket No. 110).

Petitioner filed his supplemental response (Docket No. 111) on February 24, 2003, and Respondent filed his supplemental response (Docket No. 112) on March 10, 2003. Respondent filed no response to Petitioner's Notice of Supplemental Authority.

In his Amended Petition for Writ of Habeas Corpus, Petitioner asserts the following claims of constitutional error:

1. gender discrimination in selection of grand jury foreperson;

2. insufficient evidence for first-degree murder convictions;
3. false and misleading testimony;
4. improper withholding of material, exculpatory evidence;
5. ineffective assistance of counsel;
6. involuntary medication;
7. improper jury instruction on reasonable doubt;
8. prosecutorial misconduct during the guilt phase of trial;
9. imposition of the death sentence without finding any valid aggravating circumstance;
10. improper jury instruction that mitigating circumstances had to be found unanimously;
11. his death sentence constitutes cruel and unusual punishment;
12. inaccurate information about parole given to sentencing jury that Petitioner was unable to correct;
13. prosecutorial misconduct during the sentencing phase of trial;
14. the Tennessee death penalty statute is unconstitutional;
15. improper exclusion of jurors for cause without allowing rehabilitation;
16. disproportionate and arbitrary death sentence;
17. jury uninformed about the effect of a non-unanimous verdict;
18. sentencing verdict not in compliance with Tennessee law;
19. invalid sentencing verdict because the language used in Tennessee aggravating circumstances statute is unconstitutionally overbroad and vague;

20. insufficient evidence for aggravated arson conviction; and

21. cumulative error.

Petitioner also requests an evidentiary hearing. The Court finds, however, that a hearing is unnecessary for resolution of the issues presented. Therefore Petitioner's request shall be denied.

Respondent contends that Petitioner's claims fail because they are either: (1) procedurally defaulted, (2) not cognizable, (3) conclusory in nature, or (4) based on state court decisions that were neither contrary to, nor an unreasonable application of, clearly established federal law as determined by the United States Supreme Court.

In response to Respondent's Motion for Summary Judgment, Petitioner contends that: (1) Respondent's assertion that the Antiterrorism and Effective Death Penalty Act (AEDPA) applies to this case is incorrect because application of the ADEPA here would create impermissible retroactive effects; and (2) if applicable, Respondent misconstrues AEDPA.

III. STANDARDS OF REVIEW

A. Summary Judgment

Summary judgment should be granted only when no genuine issue of material fact exists so that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. Anderson, 477 U.S. at 247–48 (emphasis in the original). A material fact is one that might affect the outcome of the suit under the governing law. Id. at 248.

The moving party bears the initial burden of informing the district court of the basis for its motion and of identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). At that point, the non-moving party must identify specific facts showing that there is a genuine issue for trial and may not rely merely upon allegations or denials of the pleadings. Id. at 324. All inferences drawn from the underlying facts must be viewed in the light most favorable to the non-movant. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

Failure by a party to respond to issues raised in summary judgment constitutes abandonment or waiver of those issues. 6A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure § 1527 (2d ed. 1990). Nonetheless, pursuant to Rule 56 of the Federal Rules of Civil Procedure, the moving party is not automatically entitled to summary judgment because the adverse party failed to adequately respond to moving party's summary judgment motion. See also 27A Federal Procedure § 62:648 (Russell J. Davis et al. eds., 1996). Rather, Rule 56 provides that under such circumstances, summary judgement shall be granted to the moving party if appropriate. Id.

> [T]he moving party must still show that the uncontroverted facts entitle the party to judgment as a matter of law, and the trial court must still view the record to determine whether the moving party has met this burden. Thus, by not responding to a motion for summary judgment, the nonmoving party only admits that no material issue of fact exists, and

does not waive all legal arguments based on those undisputed facts.

Id.

B. Habeas Corpus Claims

1. Governing law

Habeas petitions filed in a federal district court after April 24, 1996, are governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). See Martin v. Mitchell, 280 F.3d 594, 602 (6th Cir. 2002), petition for cert. filed, (U.S. Jun. 25, 2002) (No. 02-5185), citing Lindh v. Murphy, 521 U.S. 320, 326–27 (1997).

2. Claims adjudicated on the merits in state courts

Pursuant to the AEDPA:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

"A decision of a state court is contrary to clearly established federal law "'if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially

indistinguishable facts.'" Miller v. Francis, 269 F.3d 609, 614 (6th Cir. 2001), cert. denied, ____ U.S. ____, 122 S.Ct. 1592 (2002) (quoting Williams v. Taylor, 529 U.S. 362, 413, 120 S.Ct. 1495, 1523 (2000)). A decision of a state court is an unreasonable application of clearly established federal law "'if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.'" Id.

> A federal habeas court may not find a state adjudication to be "unreasonable" "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." Rather, the application must also be "unreasonable." Further, the habeas court should not transform the inquiry into a subjective one by inquiring whether all reasonable jurists would agree that the application by the state court was unreasonable. Rather, the issue is whether the state court's application of clearly established federal law is "objectively unreasonable."

Id., quoting and citing Williams v. Taylor, 529 U.S. at 410–11.

Challenges to a decision of a state court pursuant to § 2254(d)(1) can be based only on rulings from the United States Supreme Court. See Williams v. Taylor, 529 U.S. at 412 ("§ 2254(d)(1) restricts the source of clearly established law to this Court's jurisprudence."); Harris v. Stovall, 212 F.3d 940, 944 (6th Cir. 2000), cert. denied, 532 U.S. 947 (2001) (The clearly established provision of the AEDPA "marks a 'significant change' and prevents the district court from looking to lower federal court decisions in determining whether the state court decision is contrary to, or an unreasonable

application of, clearly established federal law."); Bell v. Jarvis, 236 F.3d 149, 161 n.8 (4th Cir. 2000), cert. denied sub nom, Bell v. Beck, ____ U.S. ____, 122 S.Ct. 74 (2001) ("[O]ur decisions in federal habeas cases do not create 'clearly established' law for state courts deciding future habeas cases. Only the Supreme Court can create 'clearly established' law for purposes of § 2254(d)(1)."). It is error for a federal district court to rely on authority other than that of the United States Supreme Court in its analysis under § 2254(d). Harris v. Stovall, 212 F.3d at 944.

Finally, pursuant to 28 U.S.C. § 2254 (e)(1), the factual determinations of the state courts are presumed to be correct, and Petitioner bears the burden of rebutting such presumptions by clear and convincing evidence.

2. Conclusory allegations

Rule 2(c) of the Rules Governing § 2254 Cases mandates that a habeas petitioner must state specific, particularized facts for each claim for relief specified. "Conclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief." James v. Borg, 24 F.3d 20, 26 (9th Cir. 1994).

3. Procedurally defaulted claims

A state prisoner may not challenge the constitutionality of his conviction through federal habeas review until he has first exhausted his available state court remedies. O'Sullivan v. Boerckel, 526 U.S. 838, 842 (1999); Coleman v. Thompson, 501 U.S. 722, 731 (1991). To meet the exhaustion requirement, a state prisoner must present his claims for "one complete round of the State's established appellate review process." O'Sullivan, 526 U.S. at 845.

If a claim raised in federal court was never presented in the state courts and a state procedural

rule now bans consideration of the claim in the state courts, the claim is exhausted but procedurally defaulted. Coleman, 501 U.S. at 731–32; see also Teague v. Lane, 489 U.S. 288, 297–98 (1989).

When a habeas petitioner fails to obtain consideration of a claim by a state court because he failed to raise that claim while state court remedies were still available, that claim is procedurally defaulted and cannot be considered by a federal court on habeas review absent a showing of cause and prejudice or a miscarriage of justice. Edwards v. Carpenter, 529 U.S. 446, 451 (2000); accord Seymour v. Walker, 224 F.3d 542, 549–50 (6th Cir. 2000), cert. denied, 532 U.S. 989 (2001). Cause turns on whether a petitioner can demonstrate that a substantial reason external to him thwarted his efforts to comply with state procedural rules, such as a showing that the factual or legal basis for a claim was not reasonably available at the time his case was before the state courts, or that some interference by officials made compliance impractical. Amadeo v. Zant, 486 U.S. 214, 222 (1988); accord Jamison v. Collins, 291 F.3d 380, 386 (6th Cir. 2002); McMeans v. Brigano, 228 F.3d 674, 687 (6th Cir. 2000), cert. denied, 532 U.S. 958 (2001). To demonstrate prejudice, a petitioner "must show that the alleged trial errors 'not merely ... created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with errors of constitutional dimensions.'" Jamison, 291 F.3d at 386, quoting United States v. Frady, 456 U.S. 152, 170 (1982).

4. Non-cognizable claims

A federal habeas court is "limited to deciding whether a conviction violated the Constitution, law, or treaties of the United States." Estelle v. McGuire, 502 U.S. 62, (1991). Violations of state law or procedure

that do not infringe specific federal constitutional rights are not cognizable habeas claims. Id.

IV. PRELIMINARY ISSUES

As a preliminary matter, Petitioner alleges that the AEDPA does not apply to his case, and if it does, Respondent misconstrues the AEDPA. The Court will address these arguments first. Also as a preliminary matter, the Court will address the propriety of Petitioner's recently filed Notice of Supplemental Authority.

A. Whether Petitioner's case is governed by the AEDPA

Respondent contends that because Petitioner commenced this action after April 24, 1996, it is governed by the AEDPA. Petitioner argues that pursuant to Landgraf v. USI Film Products, 511 U.S. 244 (1994), the AEDPA cannot apply to his case because its application would "attach new legal consequences" to state court litigation that occurred long before the AEDPA's enactment, thus having an impermissible retroactive effect.

The question before the Supreme Court in Landgraf was whether a federal civil rights statute applied to a case that was pending on appeal when the law was passed where the statute lacked a clear expression of congressional intent that the law should be applied retroactively. Id. at 247. Landgraf is inapplicable here because Petitioner filed his initial habeas petition on July 23, 1998, long after the AEDPA became effective when it was signed into law on April 24, 1996.

That there is no retroactivity question here is further bolstered by Lindh, where the United States Supreme Court concluded that Congress intended the AEDPA to apply to all habeas cases filed after the

statute's enactment, except in special circumstances that do not apply here.[1] 521 U.S. at 326–27. The Supreme Court further noted that the writ of habeas corpus is prospective, not retrospective, in nature. Id. at 342 (Rehnquist, C. J., Scalia, J., Kennedy, J., and Thomas, J., dissenting). "Habeas does not compensate for past wrongful incarceration, nor does it punish the State for imposing it. Instead, habeas is a challenge to unlawful custody, and when the writ issues it prevents further illegal custody." Id., citing Lane v. Williams, 455 U.S. 624, 631 (1982); Preiser v. Rodriguez, 411 U.S. 475, 489 (1973). Thus, because the writ of habeas corpus applies prospectively, Petitioner's retroactivity argument lacks merit.

B. Whether Respondent Misconstrued the AEDPA

Petitioner contends that Respondent misconstrues the AEDPA in four ways: (1) state court decisions are not subject to a "reasonable jurist" standard; (2) the AEDPA does not require deference to erroneous state court decisions; (3) the AEDPA does not apply to issues properly before the federal court that were not resolved by the state courts; and (4) as for decisions where the state courts reached the merits, the "contrary to" clause in § 2254(d)(1) is spacious enough to include a finding that the state court decision is simply wrong or not "objectively unreasonable" in applying governing United States Supreme Court precedent.

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[1] The special circumstances arise under Chapter 154 of the AEDPA when the state opts to appoint post-conviction counsel, which Tennessee has not chosen to do. For opt-in states, the AEDPA also applies to habeas cases that were pending when the AEDPA became effective. See Lindh v. Murphy, 521 U.S. 320, 326–27 (1997).

1. Reasonable jurist standard

Petitioner is correct that interpretation of the AEDPA is not subject to a "reasonable jurist" standard. Although the Sixth Circuit Court of Appeals adopted this standard in Nevers v. Killinger, 169 F.3d 352, 362 (6th Cir. 1999), and Maurino v. Johnson, 210 F.3d 638, 643–44 (6th Cir. 2000), the Sixth Circuit has since abrogated the "reasonable jurist" standard of review because of its express rejection by the United States Supreme Court in Williams v. Taylor, 529 U.S. at 409–10 (2000). Harris v. Stovall, 212 F.3d at 943. Instead, the habeas court should objectively assess whether the state court applied established federal law reasonably. Id.

2. Deference to state-court decisions

Petitioner's contention that the AEDPA does not require a federal court to defer to erroneous state-court application of federal law is premised on Part II of Justice Stevens's opinion in Williams v. Taylor. However, this reliance is misplaced because only three other justices concurred with Justice Steven's opinion in Part II. Instead, Justice O'Connor, with whom four other justices concurred, wrote the opinion of the Supreme Court for Part II, the deference issue, in Williams v. Taylor.

Contrary to Petitioner's contention, Williams v. Taylor states that the AEDPA bans an unreasonable application of federal law and that an unreasonable application of federal law is different from an incorrect or erroneous application of federal law. 529 U.S. at 410. Thus, a federal habeas court may not find a state adjudication to be "unreasonable" simply because the federal court concludes, in its independent judgment, that the state court applied clearly established federal law erroneously or incorrectly. Id., at 411. Rather, the application must also be "unreasonable." Id.

3. Application of the AEDPA to claims the state courts did not resolve

Petitioner supports his contention that the AEDPA does not apply to issues properly before this Court that were not resolved by the state courts only by referring to § 2254(d) and highlighting the phase "adjudicated on the merits" contained therein. He cites no other supporting authority.

Claims presented to, but not addressed by, a state court are deemed exhausted and thus can be addressed by a federal habeas court. Stanford v. Parker, 266 F.3d 442, 451 (6th Cir. 2001), cert. denied, (U.S. Oct. 7, 2002) (No. 01-10008); Meeks v. Bergen, 749 F.2d 322, 325 n.1 (6th Cir. 1984), citing Smith v. Digmon, 434 U.S. 332, 332–34 (1978). Moreover, such claims are subject to an independent, but deferential, standard of review. Schoenberger v. Russell, 290 F.3d 831, 835 (6th Cir. 2002). "'That independent review, however, is not a full, de novo review of the claim[], but remains deferential because the court cannot grant relief unless the state court's result is not in keeping with the strictures of the AEDPA.'" Id., quoting Harris v. Stovall, 212 F.3d at 943.

4. The contrary to clause of § 2254(d)(1)

Petitioner's argument that the "contrary to" clause in § 2254(d)(1) is spacious enough to include a finding that the state court decision is simply wrong in applying governing United States Supreme Court precedent is based on Part II of Justice Stevens' opinion in Williams v. Taylor, which does not reflect the Supreme Court's opinion. Thus, it is not binding on this Court.

However, Petitioner's argument that the "contrary to" clause in § 2254(d)(1) is spacious enough to include a finding that the state court decision is not "objectively unreasonable" is fully supported in Part II of Justice

O'Connor's opinion in Williams v. Taylor, with which four other justices concurred, is binding Supreme Court precedent.

C. Whether Petitioner's Notice of Supplemental Authority is Properly Before the Court

On February 14, 2003, Petitioner filed a Notice of Supplemental Authority alleging that Jamison v. Collins, 291 F.3d 380 (6th Cir. 2002)[2] applies to his false testimony and improperly withheld exculpatory evidence claims. (Docket No. 107). The notice has two documents attached: (1) a Motion for Discovery to the State from Petitioner's trial counsel dated September 16, 1985, and (2) an Answer from the State dated December 11, 1985, with an attached letter addressed to Petitioner's trial counsel responding to Petitioner's discovery requests. Id. Respondent makes no response to the notice. The question is whether this notice is properly before the Court.

A Notice of Supplemental Authority is not mentioned in the Federal Rules of Civil Procedure for the United States District Courts, nor in the local rules of this Court. It is mentioned in Rule 28(j)[3] of the

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[2] This case was cited by the Court in discussing the standard of review in establishing cause and prejudice to overcome procedural default. See supra Part III(B)(3).

[3] Rule 28(j) of the Federal Rules of Appellate Procedure (2002) states:

> Citation of Supplemental Authorities. If pertinent and significant authorities come to a party's attention after the party's brief has been filed- or after oral argument but before a decision- a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body

Federal Rules of Appellate Procedure. However, this is not a federal appellate court so Rule 28(j) does not apply to filings before this Court. Nonetheless, rulings on Rule 28(j) may constitute persuasive authority about a Notice of Supplemental Authority filed before this Court.

In courts, such as this one, where proper motion practice under local rules contemplates only motions, responses, replies, and memoranda, a Notice of Supplemental Authority is construed as a motion to file a surreply, which can only be filed with leave of the Court and is generally denied. See, e.g., General Elec. Co. v. Latin Am. Imports, 187 F. Supp.2d 749, 752 n.1 (W.D. Ky. 2001). "Moreover, such a motion, when utilized for the purpose of supplementing argument on pending motions, should be used sparingly and for new, controlling case law- not for recently discovered case law, nor for arguments which the parties did not think to make in their pleadings." Id. (emphasis in original). And a Notice of Supplemental Authority permits a party only to refer to new authority, not to submit new evidence. Bowman v. City of Franklin, 980 F.2d 1104, 1107 n.1 (7th Cir. 1993); Trans-Sterling, Inc. v. Bible, 804 F.2d 525, 528 (9th Cir. 1986).

In his Notice of Supplemental Authority, Petitioner cites Jamison for the proposition that the State's withholding and denial of the existence of exculpatory information requested by his trial counsel constitutes cause to overcome procedural default. While Petitioner is correct that Jamison concludes such circumstances constitute adequate cause for procedural default, this proposition is not new, controlling case law because Jamison clearly indicates that its holding is

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of the letter must not exceed 350 words. Any response must be made promptly and must be similarly limited.

premised on the need for petitioner to "provide a substantial reason for the default that is external to him." 291 F.3d at 386. Although Jamison did not identify precedent for this underlying premise, this premise is well-established United States Supreme Court precedent, not new case law. See, e.g., Amadeo, 486 U.S. at 221–22 (cause for procedural default turns on petitioner showing that some objective factor external to the defense impeded counsel's efforts to comply with state's procedural rule); see also Murray v. Carrier, 477 U.S. 478, 488 (1986) (showing that interference by officials made compliance with state's procedural rules impracticable constitutes cause for procedural default); Strickler v. Greene, 527 U.S. 263, 283 (1999) (conduct attributable to the prosecutor that impedes trial counsel's access to facts for making a claim constitutes cause for procedural default). Accordingly, Petitioner's Notice of Supplemental Authority cannot be considered by the Court as it does not raise new, controlling authority, but merely applies long-standing precedent.

Furthermore, Petitioner's Notice of Supplemental Authority fails for two other reasons. First, Petitioner did not seek leave of the Court to file this notice. Second, the relevance of the alleged new authority cited in Petitioner's notice is directly linked to two new pieces of evidence Petitioner tries to submit to the Court with his notice. Neither piece of evidence is mentioned in Petitioner's amended habeas petition, nor in his memorandum opposing Respondent's Motion for Summary Judgment. Because new evidence may not be submitted to the Court through a Notice of Supplemental Authority, any authority directly linked to improper new evidence cannot be considered by the Court. Accordingly, the Court will not consider Petitioner's Notice of Supplemental Authority.

V. PETITIONER'S CLAIMS

A. Part One - Petitioner Was Indicted By a Grand Jury Which For Years Had Systematically Excluded Women As Grand Jury Forepersons. (Docket Entry No. 53 ¶¶ 6–13)

The amended habeas petition alleges that because the grand jury that indicted Petitioner had systematically excluded women as forepersons for years, Petitioner was denied due process, equal protection, and the right to a grand jury selected from a fair cross-section of the community and free from discrimination or under-representation against any cognizable group in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

In its Motion for Summary Judgment, Respondent contends that Petitioner procedurally defaulted his grand jury discrimination claim by not raising it on direct appeal or during original post-conviction proceedings in the state courts, but rather in a motion to re-open his post-conviction petition. Alternatively, Respondent maintains that Petitioner is barred from raising this claim for federal habeas review because the Tennessee Court of Criminal Appeals procedurally defaulted Petitioner's claim on adequate and independent state law grounds. Finally, in the alternative, Respondent argues that this Court is barred from reviewing the Fourteenth Amendment due process and equal protection portions of this claim because the claim is based on a non-retroactive, new rule of Constitutional law.[4] Each argument will be addressed in turn.

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[4] Ordinarily, new constitutional rules of criminal procedure do not apply to cases that became final before the new rules were announced, except where the new rules: (1) place specific, private individual conduct beyond the power of the state to proscribe, or

1. Whether an issue first raised in a motion to re-open post-conviction petition is procedurally defaulted from federal habeas review

Respondent alleges that Petitioner procedurally defaulted the grand jury discrimination claim by raising it for the first time in a motion to re-open. Petitioner argues that his grand jury discrimination claim was not procedurally defaulted because he presented and exhausted it in the state courts through the motion to re-open his post-conviction petition.

> Forfeiture under § 2254 is a question of a state's internal law: failure to present a claim at the time, and in the way, required by the state is an independent state ground of decision, barring review in federal court.

Hogan v. McBride, 74 F.3d 144, 146 (7th Cir. 1996), citing Coleman v. Thompson, 501 U.S. at 729–44.

Pursuant to Tennessee Code § 40-30-217(a)(1), a habeas petitioner may file a motion to re-open a post-conviction proceeding if his "claim in the motion is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of the trial, if retrospective application of that right is required."

Here, with regard to selecting grand jury forepersons, Petitioner alleges three distinct constitutional violations: (1) Fourteenth Amendment due process, (2) Fourteenth Amendment equal

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(2) announce watershed rules of criminal procedure. Teague v. Lane, 489 U.S. 288, 310–11 (1989).

protection, and (3) Sixth Amendment right to a jury representing a fair cross-section of the community.[5]

Petitioner argues that both his due process and equal protection challenges arose from Campbell v. Louisiana, 523 U.S. 392 (1998). The Court in Campbell held that any criminal defendant has standing to raise equal protection and due process challenges to race discrimination in the selection of his or her grand jury. 523 U.S. at 400–01. The constitutional right to assert standing for an equal protection or due process claim as a non-member of the class for whom the right is asserted (*i.e.*, to assert third-party standing for women) was not available to Petitioner when he was tried in 1986 or when he filed either his direct appeal (1987), his original post-conviction petition (1990), or his amended original post-conviction petition (1994).

Petitioner first raised the equal protection and due process challenges to the selection of his state grand jury in his motion to re-open his post-conviction proceeding, alleging that the Campbell Court's holding on standing for race-based discrimination claims qualified for retroactive application to gender-based discrimination in his case. Thus, Petitioner raised his equal protection argument at the time and in the manner required by Tennessee Code § 40-30-217(a)(1). Therefore, contrary to Respondent's contention, Petitioner did not procedurally default this portion of his grand jury discrimination claim by not raising it on direct appeal or in original post-conviction proceedings and he is not barred from presenting it for federal habeas review. See Baker v. Corcoran, 220 F.3d 276, 291 (4th Cir. 2000) (Claims may be exhausted when

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[5] Because Petitioner was a state, not a federal, defendant at trial, his Sixth Amendment right is asserted as applicable through the Fourteenth Amendment.

first raised in a motion to re-open a post-conviction proceeding.); Tyler v. Swenson, 483 F.2d 611, 614 (8th Cir. 1973), abrograted on other grounds by Victor v. Hopkins, 90 F.3d 276 (8th Cir. 1996) (same).

In contrast, Petitioner's Sixth Amendment, fair-cross-section portion of his grand jury discrimination claim was not based on Campbell or any other case establishing a new Constitutional right of criminal procedure. Thus, the fair-cross-section portion of Petitioner's grand jury discrimination claim was ineligible to be raised in his motion to re-open pursuant to Tennessee Code § 40-30-217(a)(1). Nonetheless, the Supreme Court of Tennessee did not reject Petitioner's Sixth Amendment, fair cross-section argument on this ground. In fact, that court did not address this argument.

Because this argument was presented to the Tennessee Supreme Court even though that court failed to address it, it was exhausted. Accordingly, this Court will consider the Sixth Amendment, fair-cross-section portion of Petitioner's grand jury discrimination claim following further discussion of the due process and equal protection portions of the grand jury discrimination claim. See infra Part V(A)(3)(b).

2. Whether the Tennessee Court of Criminal Appeals procedurally defaulted Petitioner's grand jury discrimination claim on adequate and independent state law grounds

In response to Respondent's summary judgment motion, Petitioner argues that the state courts did not deny his grand jury discrimination claim on an adequate and independent state law ground because: (a) Tennessee Code Annotated § 40-30-217(a)(1) is not independent of federal law; and (b) the Tennessee Court of Criminal Appeals applied federal law, rather than a state procedural rule, to deny his claim.

Accordingly, Petitioner maintains, his claim is subject to federal habeas review. Petitioner's arguments will be addressed in turn.

a. Whether Tennessee Code § 40-30-217(a)(1) is an independent state law ground?

Petitioner argues that the State did not reject his claim on an adequate and independent state ground because Tennessee Code § 40-30-217(a)(1) is not independent of federal law. Relying on Ake v. Oklahoma, 470 U.S. 68 (1985), Petitioner maintains that there can be no independent state procedural bar to federal habeas review if the state courts must consider federal law antecedent to determining the applicability of the state procedural rule.

"[W]hen resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law...." Ake, 470 U.S. at 75.

Petitioner's reliance on Ake is misplaced. The United States Supreme Court has repeatedly emphasized that the independent state ground doctrine from Ake applies only to criminal cases on direct review, not collateral review. See, e.g., Coleman, 501 U.S. at 741; Stewart v. Smith, ___ U.S. ___, ___, 122 S.Ct. 2578, 2581 (2002). Nonetheless, in Stewart the United States Supreme Court assumed, without deciding, that Ake applied in the post-conviction context and held that if the decision of the state courts in barring review of a post-conviction claim relies only upon categorizing the claim rather than reaching its merits, the decision of the state courts is independent of federal law. ____ U.S. at ____, 122 S.Ct. at 2581–82.

Here, the Tennessee Supreme Court denied Petitioner's grand jury discrimination claim by categorizing it as not qualifying for retroactive

application of a new constitutional rule of criminal procedure. The court did not reach the merits of Petitioner's claim. Nonetheless, in making its categorization, the Tennessee Supreme Court, unlike the state court in Stewart, applied federal law.[6]

Here, application of Tennessee Code Annotated § 40-30-217(a)(1) depended on reaching the merits of two federal constitutional questions: (1) whether Petitioner's claim involved a new constitutional right; and (2) whether that right was retroactive. Hence, assuming that Ake applies, the Court concludes that Tennessee Code § 40-30-217(a)(1) cannot be a procedural bar to federal habeas review here.

b. Whether the Tennessee Court of Criminal Appeals applied federal law, rather than a state procedural rule, to deny Petitioner's grand jury discrimination claim

Petitioner also maintains that because the Tennessee Court of Criminal Appeals applied federal law, rather than a state procedural rule, to deny his grand jury discrimination claim, this claim is not barred from federal habeas review.

"'In habeas, if the decision of the last state court to which the petitioner presented his federal claims fairly appeared to rest primarily on resolution of those claims, or to be interwoven [with federal law], and did not clearly and expressly rely on an independent and adequate state ground, a federal court may address the petition.'" Burroughs v. Makowski, 282 F.3d 410, 413 (6th Cir. 2002), modified on reh'g on other grounds by

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[6] The state court in Stewart merely decided whether a habeas claim was of "'sufficient constitutional magnitude' to require a knowing, voluntary, and intelligent waiver" of a state procedural rule. Stewart v. Smith, ___ U.S. ___, ___, 122 S.Ct. 2578, 2581 (2002).

2002 WL 1115469 (6th Cir. May 16, 2002) (quoting Coleman, 501 U.S. at 735). "'[W]hether a state court rested its holding on procedural default, thus barring federal habeas review, is a question of law to be reviewed de novo.'" Id. (quoting Couch v. Jabe, 951 F.2d 94, 96 (6th Cir. 1991)).

The record shows that the trial court denied Petitioner's Motion to Re-open without comment. (Addendum No. 31, Application for Permission to Appeal, at 16). On appeal, the Tennessee Court of Criminal Appeals affirmed the trial court's order on the grounds that although Campbell v. Louisiana, 523 U.S. 392 (1998), created a new Constitutional right for any prisoner, not just a member of the group whose rights were allegedly violated, to challenge discrimination in the selection of a grand jury and a grand jury foreperson, the Sixth Circuit determined in Coe v. Bell, 161 F.3d 320, (6th Cir. 1998), that Teague v. Lane, 489 U.S. 288 (1989), barred retroactive application of this right. (Addendum No. 32, Order of the Tennessee Court of Criminal Appeals, at 4).

Because the record shows that the state court relied on federal law to resolve Petitioner's grand jury discrimination claim and did not clearly and expressly rely on an independent and adequate state ground, this Court may address Petitioner's claim.

3. Whether the Fourteenth Amendment due process and equal protection portions of Petitioner's grand jury gender-discrimination claim are based on non-retroactive, new rules of Constitutional law

Respondent argues that this Court is barred from reviewing the due process and equal protection portions of Petitioner's grand jury discrimination claim because they are based on non-retroactive, new constitutional rules of criminal procedure. In response,

Petitioner counters that Campbell established no new rules of federal law but merely restated federal law that existed at the time that Campbell's case was before the state courts.

Because the state courts rejected Petitioner's due process and equal protection arguments on the same grounds Respondent asserts here, Respondent, in essence, is arguing that the decision of the state courts was neither contrary to, nor an unreasonable application of, clearly established federal law as determined by the United States Supreme Court.

"[A] case announces a new rule [of criminal procedure] if the result was not dictated by precedent existing at the time the defendant's conviction became final." Teague, 489 U.S. at 301 (emphasis in original removed). The test of whether a defendant's claim was instead "dictated by then-existing precedent" is whether "the unlawfulness of [the] conviction was apparent to all reasonable jurists" at the time of defendant's conviction. Lambrix v. Singletary, 520 U.S. 518, 527 (1997), citing Graham v. Collins, 506 U.S. 461, 477 (1993) (emphasis in original removed). When the state court made "reasonable, good-faith interpretations of existing precedents," its decision may not be disturbed. Butler v. McKellar, 494 U.S. 407, 414 (1990).

Petitioner asserts that because his grand jury gender-discrimination claim was before the state courts in 1999 and because the Supreme Court's holding in Campbell is an extension of earlier Supreme Court precedent, that holding applies to his case. Petitioner misconstrues both the facts and the law.

For the purposes of the Teague retroactivity analysis, a state conviction becomes final when the availability of direct appeal to the state courts has been

exhausted and the time for filing a petition for writ of certiorari with the United States Supreme Court has elapsed or a timely filed certiorari petition has been denied. Caspari v. Bohlen, 510 U.S. 383, 390 (1994). Here, Petitioner's conviction became final on June 28, 1990, when the Supreme Court denied his petition for writ of certiorari from his direct appeal, and the Supreme Court decided Campbell on April 21, 1998. Thus, Petitioner's conviction became final almost eight years before the decision in Campbell, so the holding in Campbell would apply to Petitioner only if that holding extends earlier Supreme Court precedent dating back at least to June 28, 1990.

As aforementioned, Petitioner's Fourteenth Amendment grand jury gender-discrimination claim is brought under two challenges, i.e. due process and equal protection. Because of the separate precedents governing each challenge, each challenge must be distinctly examined to determine whether the holding from Campbell represents an extension of precedent that existed when Petitioner's conviction became final.

a. Equal protection

At the time Petitioner's conviction became final in 1990, a criminal defendant did not have standing to contest discrimination against a given class in the selection of grand jury members unless the defendant also was a member of that class. See, e.g., Castaneda v. Partida, 430 U.S. 482, 494 (1977) ("[I]n order to show that an equal protection violation has occurred in the context of grand jury selection, the defendant must show that the procedure employed resulted in substantial under-representation of ... the identifiable group to which he belongs."); McCleskey v. Kemp, 481 U.S. 279, 352 (1987) (Blackmun, J., dissenting) (prisoner with equal protection claim must establish that he is a member of the group singled out for different

treatment); Sheffield v. Lack, No. 88-5459, 1988 WL 121252, at *1 (6th Cir. Nov. 15, 1988) (male lacks standing to contest systematic exclusion of women as grand jury foreperson)[7]; Sheffield v. Lack, 702 F.Supp. 634, 636 (M.D. Tenn. 1988) (same); State v. McKay, 680 S.W.2d 447, 450 (Tenn. 1984) (same); State v. Workman, 667 S.W.2d 44, 49 (Tenn. 1984) (same); State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984) (same); Turner v. State, 698 S.W.2d 90, 91–92 (Tenn. Crim. App. 1985) (male lacks standing to contest systematic exclusion of women as grand jury foreperson); State v. Chambless, 682 S.W.2d 227, 230 (Tenn. Crim. App. 1984) (same).

Campbell granted a white defendant standing to challenge discrimination against blacks in the selection of grand juries on equal protection grounds. 523 U.S. at 400. In reaching this conclusion, the Supreme Court expressly relied on earlier precedent from Powers v. Ohio, 499 U.S. 400 (1991), where it determined that a white defendant had standing to challenge racial discrimination against blacks in the use of peremptory challenges. 523 U.S. at 397–400.

The Supreme Court of Tennessee rejected Petitioner's grand jury gender-discrimination claim relying upon Coe v. Bell, 161 F.3d 320 (6th Cir. 1998), to conclude that retroactive application of Campbell was barred by Teague.[8] In Coe v. Bell, the Sixth Circuit noted that because third-party standing for equal protection challenges to race-based, grand jury discrimination, which the Supreme Court recognized in Campbell, was an extension of its previous holding in

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[7] Unpublished opinion.

[8] The Tennessee Supreme Court did not distinguish the three portions of Petitioner's grand jury discrimination claim.

Powers, that rule was retroactive to 1991, when Powers was decided. 161 F.3d at 352–53. However, the Sixth Circuit held that because Coe's conviction became final seven years before Powers was decided, the new third-party standing rule for equal protection challenges from Campbell could not apply to Coe, even if that rule extended beyond race-based discrimination to gender-based discrimination. *Id.* at 353. The Sixth Circuit declined to determine whether applying Campbell and Powers beyond race-based discrimination to gender-based discrimination may itself represent a new rule. *Id.* at 353 n.8.

Because Coe v. Bell did not hold that retroactive application of Campbell was barred by Teague in the equal protection context, the Tennessee Supreme Court misapplied Coe v. Bell in the equal protection context to Petitioner's case. Nevertheless, the decision of the Tennessee Supreme Court was not an erroneous or unreasonable application of federal law as determined by the United States Supreme Court. Misapplying a lower federal appellate court's interpretation of federal constitutional law is not necessarily an erroneous application of United States Supreme Court precedent.

Extending the third-party standing for equal protection challenges recognized in Campbell and Powers for race-based discrimination to gender-based discrimination may represent a new constitutional rule of criminal procedure whose retroactive application to Petitioner's case would be barred by Teague. Such a holding would be an error-free, reasonable application of United States Supreme Court precedent to this case. Moreover, an erroneous, but not unreasonable, application of federal law by the state courts is permissible under § 2254(d). Hence the decision of the state courts, even if not error-free here, was neither

contrary to, nor an unreasonable application of, clearly established federal law as determined by the United States Supreme Court.

Furthermore, even if the rule permitting third-party standing for equal protection challenges to race-based grand jury discrimination from Campbell, which was made retroactive to 1991 by Powers, applies to gender-based discrimination claims, it would be of no avail to Petitioner because Petitioner's conviction became final in 1990, before the date of retroactive application of the new rule. Thus, Petitioner's claim is non-cognizable because the constitutional right he asserts did not exist when his conviction became final.

Accordingly, Respondent is entitled to summary judgment on the Fourteenth Amendment, equal protection portion of Petitioner's grand jury discrimination claim.

b. Due process

As aforementioned, the Supreme Court of Tennessee rejected Petitioner's grand jury gender-discrimination claim relying upon Coe v. Bell and agreeing with the Sixth Circuit's determination that retroactive application of Campbell was barred by Teague. The Supreme Court of Tennessee correctly interpreted the Sixth Circuit's ruling regarding third party standing for a due process challenge to gender-based, grand jury discrimination.

Because the Supreme Court of Tennessee adopted the reasoning of the Sixth Circuit in Coe v. Bell as the basis for its decision, this Court must examine the decision in Coe v. Bell to ensure that it is neither contrary to, nor an unreasonable application of, clearly established federal law as determined by the United States Supreme Court. In doing so, the Court must rely on United States Supreme Court precedent only

and may not use lower federal court opinions as persuasive authority.

In Coe v. Bell, the Sixth Circuit concluded that third-party standing for a due process challenge to race-based, grand jury discrimination, identified in Campbell, was based on statutory, not constitutional, law. 161 F.3d at 353–55. The Sixth Circuit further noted that in Campbell, the United States Supreme Court relied upon Peters v. Kiff, 407 U.S. 493 (1972) and Hobby v. United States, 468 U.S. 339 (1984) for its due process holding. Id. Yet, the Sixth Circuit concluded that neither case supported a constitutional basis for third-party standing for a due process challenge to gender-based grand jury discrimination, so there was no basis for retroactive application of the due process holding from Campbell. Id.

Regarding Peters, the Sixth Circuit noted that (1) three justices believed that the defendant's grand jury race discrimination claim stemmed from both Fourteenth Amendment due process rights and a governing criminal statute; (2) three other justices believed defendant's claim stemmed solely from the statute; and (3) one justice dissented. Id. at 353. Reasoning that because "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds," Marks v. United States, 430 U.S. 188, 193, (1977), the Sixth Circuit concluded that Peters does not constitute precedent for a constitutional due process right. Id. at 354. Rather, the Sixth Circuit concluded that Peters recognized a statutory right to due process protection limited to racial discrimination in the selection of a grand jury. Id.

Regarding Hobby, the Sixth Circuit stated:

In Hobby, a white male defendant challenged his indictment because he said that the grand jury excluded Blacks and women. Because Hobby's claim had been dismissed as a matter of law, the Supreme Court assumed that the violation had occurred and proceeded to consider if Hobby had any remedy. The Court began by noting that purposeful exclusion of women and Blacks from grand jury service was unconstitutional, without distinguishing between gender and race. In proceeding next to the question of remedy, therefore, the Court seemed to be assuming implicitly that Hobby had standing to raise his claim, both on gender and racial grounds, though it noted the narrow holding of Peters. In the end, the Court decided (for reasons that do not concern us) that Hobby was not entitled to a remedy. The Campbell Court read Hobby approvingly, as establishing some sort of due-process protection with regard to race (the only issue Campbell pursued), though it left the determination of the bounds of that protection, which it said were "still open," for the lower court to determine on remand.

We do not doubt that Hobby and Campbell can be read as extending due-process protection to men challenging the exclusion of women, though neither case provided detail on the extent of that protection. The casual manner in which these cases suggest such an extension does not mean, however, that the holdings followed necessarily from "existing precedent." Indeed, the failure of Hobby even to mention the gender/standing question paved

> the way for conclusions such as the one we reached later in Ford v. Seabold.

161 F.3d at 354.

As further evidence that Hobby did not constitute existing precedent, the Sixth Circuit cited Justice Marshall's dissent from denial of certiorari in Ford v. Kentucky, 469 U.S. 984 (1984), in which Marshall squarely addressed the issue of standing to raise a due-process claim based on gender discrimination in grand jury selection, and noted that Justice Marshall: (1) did not mention Hobby in this post-Hobby dissent, (2) admitted that *Peters* did not resolve the issue in the gender context, and (3) acknowledged that there were conflicting lower court decisions on both sides of the issue. 161 F.3d at 354–55.

The Sixth Circuit then cited numerous additional cases to document differences of opinion on the issue and concluded that Teague barred the Sixth Circuit from applying Campbell retroactively to gender-based discrimination claims. Id. at 355.

The Court is persuaded that the Sixth Circuit's (and hence the state courts') decision that Peters and Hobby lend no support for retroactive application of the due process holding from Campbell is neither contrary to, nor an unreasonable application of, Lambrix, Butler, and Teague. Thus, Respondent is entitled to summary judgment on the Fourteenth Amendment, due process portion of Petitioner's grand jury discrimination claim.

4. Whether the Sixth Amendment fair-cross-section portion of Petitioner's grand jury gender-discrimination claim is cognizable

Petitioner contends that the systematic exclusion of women from the role of grand jury foreperson denied him his Sixth Amendment right to a jury selected from a fair cross-section of the community and free from

discrimination or under-representation against any cognizable group. Although Respondent did not address this argument, the Court grants Respondent summary judgment sua sponte on this issue because this portion of Petitioner's grand jury gender-discrimination claim is not cognizable.[9]

Because Petitioner presented this portion of his grand jury gender-discrimination claim to the Tennessee Supreme Court but that court did not address it, this Court conducts "an independent review of federal law to determine if the state court either contravened or unreasonably applied clearly established federal law." Schoenberger, 290 F.3d at 835. "'That independent review, however, is not a full, de novo review of the claim[], but remains deferential because the court cannot grant relief unless the state court's result is not in keeping with the strictures of the AEDPA.'" Id., quoting Harris v. Stovall, 212 F.3d at 943.

While the Fifth Amendment requires the federal government to use a grand jury to initiate a prosecution, this requirement is not binding on the states. See Campbell v. Louisiana, 523 U.S. 392, 399 (1998), citing Hurtado v. California, 110 U.S. 516 (1884). Nevertheless, if a state elects to use a grand jury, its system for selecting grand jurors must comport with the Due Process and Equal Protection Clauses of the

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[9] A court may *sua sponte* grant summary judgment on dispositive grounds not raised by either party where the record discloses no issue of material fact and the prevailing party is entitled to judgment as a matter of law. Routman v. Automatic Data Processing, Inc., 873 F.2d 970, 971 (6th Cir. 1989). Here, sua sponte summary judgment is permissible because the only material fact, whether Petitioner was a state or federal defendant at trial, is undisputed by the parties and clear from the record.

Fourteenth Amendment. Smith v. Texas, 311 U.S. 128 (1940); Cassell v. Texas, 339 U.S. 282 (1950). Thus, when a federal court reviews a state's grand jury selection system, its powers are limited to those conferred by the Fourteenth Amendment.

The Sixth Amendment, as made applicable to the states through the Fourteenth Amendment, requires that a petit jury be drawn from a representative cross-section of the community. Taylor v. Louisiana, 419 U.S. 522, 528 (1975); Duren v. Missouri, 439 U.S. 357 (1979). However, this Sixth Amendment right does not extend to a grand jury.

> [A] state defendant has no right to a grand jury that reflects a fair cross-section of the community. The right to a 'representative' grand jury is a federal right that derives not from the requirement of equal protection but from the Fifth Amendment's explicit requirement of a grand jury. That right is similar to the right applicable to state proceedings to a representative petit jury under the Sixth Amendment.... But in a state case in which the challenge is to the grand jury, only the Fourteenth Amendment applies, and the defendant has the burden of proving a violation of the Equal Protection Clause.

Castaneda, 430 U.S. at 510 (Powell, J., dissenting).

Here, the state court did not even cursorily address the Sixth Amendment fair-cross-section portion of Petitioner's grand jury gender-discrimination claim. Applying Campbell, Hurtado, Taylor, and Duren, the Court concludes that the state court did not contravene clearly established federal law in denying Petitioner's claim because the Sixth Amendment, as applicable to the states through the Fourteenth Amendment,

guarantees state defendants a right to a fair cross-section of the community only for petit juries, but not for grand juries. Thus, because Petitioner was a state, and not a federal, defendant at trial, his grand jury foreperson discrimination claim is not cognizable under the Sixth Amendment. Accordingly, Respondent is granted summary judgment *sua sponte* on the Sixth Amendment, fair cross-section portion of Petitioner's grand jury gender-discrimination claim.

B. Part Two - Petitioner's Convictions for First-Degree Murder Are Not Supported By Sufficient Evidence. (Docket Entry No. 53 ¶¶ 14–35)

The amended habeas petition contends that in violation of the Fourteenth Amendment, there is insufficient evidence to support a finding of deliberateness, premeditation, malice, or wilfulness with regard to either of Petitioner's first-degree murder convictions. Specifically, he claims the testimony of his accomplice, Terry Wayne Flatt, was not adequately corroborated by independent evidence and apart from Flatt's testimony there is no evidence for first degree murder.

Respondent disagrees, claiming that because the evidence of guilt relied upon by the state courts fully satisfies the requirement[10] of Jackson v. Virginia, 443 U.S. 307 (1979), and Tennessee law, Petitioner's first-degree murder convictions were: (1) neither contrary to, nor an unreasonable application of, clearly established federal law as determined by the United States Supreme Court, and (2) based on a reasonable

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[10] After reviewing the evidence in the light most favorable to the prosecution, could any rational trier of fact have found the essential elements of the crime beyond a reasonable doubt? Id., 443 U.S. at 319.

determination of the facts in light of the evidence in the record at trial.

In response, Petitioner alleges that the decisions of the state courts regarding the sufficiency of the evidence were contrary to and an unreasonable application of United States Supreme Court precedent. Petitioner argues that because there was no independent corroboration of the accomplice's testimony about the deaths of the victims, there was insufficient evidence for Petitioner to be convicted of murder (Docket Entry No. 53 ¶¶ 14–22). Alternatively, Petitioner maintains that even if sufficient, independent, corroborative evidence exists to establish that he murdered the victims, no evidence exists to establish the required mental state for first-degree murder; thus, Petitioner argues that, at best, he can only be guilty of second-degree murder (Allegations No. 23–35).

The Court will address each argument in turn. Because Petitioner does not contest the factual findings of the state courts, this Court must give those findings deference.

1. Independent corroboration of the accomplice's testimony (Docket Entry No. 53 ¶¶ 14–22, 28–32, 35)[11]

Petitioner urges that there was insufficient evidence to support murder convictions because there was no independent corroboration of the testimony of his accomplice, Wayne Flatt, about the deaths of the victims. Petitioner contends that the independent evidence that was presented by the prosecution, at most, merely casts suspicion on Petitioner or only shows he had an opportunity to commit the crimes and thus is insufficient.

Respondent counters that sufficient, independent, corroborative evidence was presented at trial and that under state law, such evidence may be circumstantial and need not itself be adequate to support a conviction. Respondent maintains that accordingly, the decision of the state courts was neither contrary to, nor an unreasonable application of, Jackson.

Due process requires that no person be made to suffer a criminal conviction except upon sufficient proof. 443 U.S. at 316. The critical inquiry for a sufficiency of the evidence claim on habeas review is whether pursuant to controlling state law, the record could reasonably support a finding of guilt beyond a reasonable doubt. Id. at 318. In this inquiry, the reviewing court is not permitted to make its own

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[11] Paragraphs 19–22, placed under a heading for Fred Stafford, address allegations related to Edna Stafford. Paragraphs 29–32 address Petitioner's claim that insufficient corroborating evidence supports his conviction for the murder of Fred Stafford, despite being placed under a heading alleging insufficient evidence on other grounds. Paragraphs 28 and 35 address insufficient evidence for Edna and Fred Stafford, respectively. Despite the fact that ¶ 28 pertains to Edna Stafford, it was placed under a heading for Fred Stafford.

subjective determination of guilt or innocence. Id. at 319 n.13. "Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. at 319 (emphasis in the original).

On direct review of the sufficiency of the evidence for Petitioner's conviction for first-degree murder and aggravated arson, the Supreme Court of Tennessee stated:

> A conviction may not be based upon an accomplice's testimony unless there is some fact testified to entirely independent of the accomplice's testimony which taken by itself leads to an inference, not only that a crime has been committed, but that the accused is implicated in the crime. The corroborative evidence may be direct or entirely circumstantial and it need not of itself be adequate to support a conviction. It is sufficient to meet the requirements of the rule if it fairly and legitimately tends to connect defendant with the commission of the crime charged.
>
> The State clearly showed that a crime had taken place. Fred Stafford died as a result of a bullet passing through his heart. Edna Stafford died as a result of burns from the fire and inhalation of gases from the fire. A spent .22 rifle shell was found in the ashes near where Fred Stafford's body was lying. This cartridge was fired from a Marlin .22 rifle, located by law enforcement officers where Flatt testified defendant had hidden it and another weapon after the homicide. This rifle

was never positively identified as the murder weapon because of its condition when it was found. David Henley, the defendant's brother, testified it was similar to one he had acquired some four or five months before and had left in his grandmother's house for her protection. This rifle had a loose part on the end, as did the State's exhibit and the bluing was scratched off the sight in the same way. The rifle was no longer at his grandmother's house. Ronald Leonard identified the State's exhibit as an automatic .22, Glenfield rifle, made by Marlin, which looked just like a rifle he had traded to David Henley. At the time of the trade the Allen screw securing a ring holding the magazine in place was loose. The ring would slide off and on occasion the rifle would jam when fired. Defendant himself noted the similarity between the State's exhibit and his brother's rifle. He endeavored to place the weapon in the possession of Flatt whom he had left by the roadside while he went to visit his grandmother. This of course was a question for the jury. There was evidence of bad feelings between defendant and the Staffords over a car wreck which he believed was due to the Stafford's fault. The gas can in defendant's truck from which Flatt testified he filled the plastic jug had to be refilled on the weekend following the burning of the Stafford's house. A near neighbor of the Staffords saw defendant drive past, apparently on the way to his grandmother's. Sometime later she heard a loud noise, "maybe an explosion or something real loud. Louder than a gunshot." A minute or two after that she saw defendant's truck

> come back down the road. Shortly after that her husband saw smoke coming from the direction of the Stafford home. They went together to see about it. When they arrived there was fire all over, it looked like it was boiling inside. Defendant denied knowing anything about the fire until the next day although a police officer corroborated Flatt's testimony that, on the night of the fire, he told defendant about the fire when he encountered them on the road and stopped to ask directions to the Stafford house. An arson investigator with the State Fire Marshall's Office investigated the fire. He suspected arson although there was no physical evidence of that fact. He did not make any test for accelerants because there was a total burn-out and it was his opinion any accelerant would have been burned away.

Henley, 774 S.W.2d at 913–14 (citations omitted). The Supreme Court of Tennessee concluded that this constituted abundant independent evidence to corroborate Petitioner's guilt of murder and arson, fully satisfying the requirements of Jackson. Id. at 914.

Where the state courts have fully considered the sufficiency of the evidence, the task of a federal habeas court is not difficult. Jackson, 443 U.S. at 322. The Court is persuaded that the decision of the state courts was neither contrary to, nor an unreasonable application of Jackson.

Petitioner's contention that there is no corroborating evidence that Petitioner shot Edna Stafford (Docket Entry No. 53 ¶ 22), while true, is of no consequence because the state courts found that Edna Stafford died from burns and inhalation of noxious

gases from the fire. Even Petitioner acknowledges this finding (Id. ¶ 20).

Petitioner's contention that people can die by inhaling noxious gases without being murdered (Id. ¶ 22) and that therefore Edna Stafford's death by burns and inhaling noxious fumes does not establish a homicide or Petitioner's guilt (Id. ¶ 20) improperly asks the Court to re-weigh, or reevaluate the evidence. In reviewing a sufficiency of the evidence challenge, this Court is required to give the prosecution the strongest, legitimate view of the evidence in the record, as well as all reasonable and legitimate inferences which may be drawn therefrom. Under Tennessee law, aggravated arson may be used to establish first degree murder. See State v. Hall, 958 S.W.2d 679, 693 (1997) ("[T]he circumstances of a particular case may support a jury finding that the offense of first degree murder was committed both with premeditation and during the course of perpetrating another felony.")

Likewise, Petitioner's contention that murder is not established by: (1) bad feelings between people, (2) the filling of a gas tank, (3) a fire, and (4) proximity to the fire (Docket Entry No. 53 ¶ 22) improperly asks this Court to reevaluate or re-weigh the evidence. Moreover, bad feelings between people and the filling of a gas tank constitute proof of motive and planning, respectively, which are relevant factors for a jury to weigh in determining whether a defendant committed first degree murder. See State v. Hall, No. 03C01-9303-CR-00065, 1996 WL 740822, at *8 (Tenn. Crim. App. Dec. 30, 1996). And the fact that there was a fire and that the defendant was in close proximity when it occurred are also relevant proof for the jury's consideration.

Finally, Petitioner's assertion that there is no corroborating evidence that he shot Fred Stafford

(Docket Entry No. 53 ¶¶ 29–31) is contradicted by the record. In addition to the corroborating evidence that Petitioner murdered both Fred and Edna Stafford, the state courts noted the following specific corroborating proof that Petitioner murdered Fred Stafford: (1) a spent .22 rifle shell found near the victim at the murder scene, (2) a .22 Marlin rifle found where Flatt testified Petitioner had hidden it after the crime, and (3) even though the .22 Marlin rifle could not be positively identified as the murder weapon because of the condition it was in when it was found, testimony by several witnesses that the rifle had similar characteristics to the one Petitioner's brother had purchased for his grandmother which was no longer at her home.

Contrary to Petitioner's assertions, the independent evidence here more than casts a mere suspicion on Petitioner or only shows he had an opportunity to commit the crimes (Docket Entry No. 53 ¶¶ 22, 31). "[I]t fairly and legitimately tends to connect the defendant with the commission of the crime[s] charged," Sherrill v. State, 321 S.W. 2d 811, 815 Tenn. 1959), and that is all that is required under controlling state law.

Petitioner's contention that the evidence cannot exclude that his accomplice, Terry Flatt, and not Petitioner, shot Edna and Fred Stafford (Docket Entry No. 53 ¶¶ 22, 31) is beyond the role of this court to determine. Pursuant to Jackson, the reviewing court is not permitted to make its own subjective determination of guilt or innocence. The question for this Court to determine is whether Petitioner has proven that there is no possibility that he could have murdered the victims. Petitioner has failed to carry this burden of proof. Accordingly, Respondent is entitled to summary judgment on this portion of

Petitioner's sufficiency of the evidence claim for the first-degree murders of the Staffords.

2. Sufficiency of evidence to support first-degree murder conviction (Docket Entry No. 53 ¶¶ 23–28, 33–35)

Although this portion of Petitioner's sufficiency of the evidence claim was raised in his amended petition for habeas corpus relief, Respondent did not raise it in his Motion for Summary Judgment. Nonetheless, Petitioner raised it as an alternative argument in response to Respondent's Motion for Summary Judgment on the sufficiency of the evidence issue. Because Respondent did not file a reply brief, Respondent did not respond to Petitioner's alternative argument that even if independent, corroborative evidence exists to establish that Petitioner murdered the victims, no evidence exists to establish the required mental state of deliberation, premeditation, maliciousness, and/or willfulness for first-degree murder.

In its Order of February 11, 2003, the Court, sua sponte, determined that Petitioner procedurally defaulted this portion of his sufficiency of the evidence claim by not raising it in the state courts. (Docket No. 105). Moreover, the Court noted that because Respondent did not raise procedural default, Petitioner was not placed on notice that the Court would consider this defense. Id. at 3. Thus, the Court ordered each party to submit a supplemental response limited to showing cause and prejudice or a fundamental miscarriage of justice to overcome Petitioner's procedural default on "the sufficiency of the evidence to establish the required mental state for a first-degree murder charge." Id.

Petitioner continues to assert that he did not procedurally default his sufficiency of the evidence

claim. And he maintains that the Court, nonetheless, must review any sufficiency of the evidence claim because if there is insufficient evidence to support a conviction, the petitioner is actually innocent, and absent review, would be a victim of a fundamental miscarriage of justice.

Petitioner maintains that he is actually innocent because insufficient evidence exists to establish the required mental state for first-degree murder without Flatt's testimony. And Petitioner contends that Flatt's testimony, which established the essential elements of premeditation and deliberation required for first-degree murder, is discredited by: (1) Flatt receiving consideration from the State, *i.e.*, early release on parole, for testifying against Petitioner at trial, and (2) Flatt falsely testifying at trial that he had no expectation of early release from prison. Petitioner raises no cause and prejudice argument to overcome procedural default.

Respondent maintains that Petitioner's argument that this Court must review the procedurally defaulted portion of Petitioner's sufficiency of the evidence claim lacks merit because it misapplies the miscarriage of justice standard. Respondent further maintains that the new evidence Petitioner submits—that Flatt, Petitioner's co-defendant, was released on parole after serving a relatively short portion of his sentence—does not establish actual innocence because it fails to prove that the State made a prearranged deal with Flatt for early release in exchange for testifying against Petitioner at the time of the trial. Alternatively, Respondent argues that even if Petitioner's evidence is sufficient to create an inference of the existence of a deal between Flatt and the State at the time of the trial, it is still insufficient to establish Petitioner's claim

of actual innocence given the other corroborative evidence available for consideration by the jurors.

The Court will address: (1) Petitioner's assertion that he did not procedurally default his sufficiency of the evidence claim, (2) whether a federal habeas court must always review a sufficiency of the evidence claim, and (3) whether Petitioner establishes the miscarriage of justice exception to overcome procedural default.

a. Whether Petitioner procedurally defaulted his sufficiency of the evidence claim

Petitioner's assertion that he did not procedurally default his sufficiency of the evidence claim, an assertion supported only by citation to his earlier submitted Motion to Reconsider (Docket No. 106), has already been addressed twice by the Court (Docket Nos. 105 and 109) and is entitled to no further review here. As the Court noted in its Memorandum rejecting Petitioner's Motion to Reconsider:

> The Court did not hold that Petitioner procedurally defaulted his entire sufficiency of the evidence claim, *i.e.*, paragraphs 14–35 in the amended habeas petition, by failing to raise it before the state court, as Petitioner alleges. Rather, the Court held that Petitioner procedurally defaulted a narrower portion of that claim, namely the 'sufficiency of the evidence to establish the required mental state for first-degree murder. That the Court's Order made this narrower holding is clear, not only from its language, which ordered Petitioner "to file a supplemental brief by the close of business on Monday, February 24, 2003, limited to showing cause and prejudice or a fundamental miscarriage of justice on the sufficiency of the evidence to establish the required mental state for a first-degree murder

> charge" (Docket No. 105 at 3), but also from the Court's reference to the specific portions of Petitioner's sufficiency of the evidence claim in the amended habeas petition that dealt with sufficiency of the evidence regarding required mental state for first-degree murder, *i.e.*, paragraphs 23–28 and 33–35. (Docket No. 105 at 1).

(Docket No. 109 at 6–7) (footnote omitted).

b. Whether a federal habeas court must always review a sufficiency of the evidence claim

Petitioner contends that a federal habeas court must always review a sufficiency of the evidence claim because if insufficient evidence exists to support a conviction, the petitioner is actually innocent, and absent review, would be a victim of a fundamental miscarriage of justice. Petitioner maintains that his argument is supported by: (1) Haley v. Cockrell, 306 F.3d 257 (5th Cir. 2002), (2) Johnson v. Hargett, 978 F.2d 855 (5th Cir. 1992), and (3) Jones v. Delo, 56 F.3d 878 (8th Cir. 1995).

Respondent counters that because Petitioner mistakenly equates actual innocence with legal innocence instead of with factual innocence, as required under the miscarriage of justice standard, Petitioner's contention that this Court must review the procedurally defaulted portion of Petitioner's sufficiency of the evidence claim lacks merit and is contrary to United States Supreme Court precedent. Respondent contends that Petitioner's reliance on Haley, Johnson, and Jones is misplaced because these cases all acknowledge that under the miscarriage of justice exception to procedural default, the reviewing court must first establish actual innocence before reaching the merits of a constitutional claim.

"'[T]he miscarriage of justice exception is concerned with actual as compared to legal innocence.'" Calderon v. Thompson, 523 U.S. 538, 559 (1998), quoting Sawyer v. Whitley, 505 U.S. 333, 339 (1992). "'[A]ctual innocence' means factual innocence, not mere legal insufficiency." Bousley v. United States, 523 U.S. 614, 623 (1998).

Petitioner's argument that proving insufficiency of the evidence establishes actual innocence directly contradicts United States Supreme Court precedent as enunciated in Calderon, Sawyer, and Bousley. Moreover, Respondent's contention about Petitioner's misplaced reliance on Haley, Johnson, and Jones is correct. Pursuant to the miscarriage of justice exception to procedural default, the reviewing court must first establish actual innocence before reaching the merits of a constitutional claim. See Haley, 306 F.3d at 266 ("Having concluded that the actual innocence exception applies to this case, we now must consider the merits of Haley's insufficiency-of-the-evidence claims."); Jones, 56 F.3d at 882 (establishing that the actual innocence exception applies is the gateway to reviewing the merits of a constitutional claim); Johnson, 978 F.2d at 860–61 (not reaching the merits of the petitioner's claim because he failed to first establish actual innocence). Thus, contrary to Petitioner's assertion, a federal habeas court need not always review a sufficiency of the evidence claim.

c. Whether Petitioner establishes the miscarriage of justice exception to overcome procedural default.

Petitioner maintains that insufficient evidence exists to establish the required mental state for first-degree murder because without Flatt's testimony, which Petitioner alleges lacks credibility, the essential elements of premeditation and deliberation required

for first-degree murder were not proven at trial. Pointing to Flatt's early release on parole without opposition by the State, Petitioner alleges this constitutes evidence that Flatt received consideration for his testimony against Petitioner at trial and undermines Flatt's credibility.

Respondent counters that proving factual innocence requires new evidence and that the only new evidence Petitioner submits—that Flatt was released on parole after serving a relatively short portion of his sentence—is insufficient to establish that Flatt's testimony at trial against Petitioner was secured in exchange for a promise of early parole by the State as Petitioner alleges. Respondent also complains that Petitioner's argument ignores the evidence presented at Flatt's parole hearing regarding Flatt's speaking to high school students, clean drug tests, and testimony by prison officials that Flatt was "one of the best prisoners they ever had" as justification for Flatt's early parole. Respondent maintains that the State's failure to oppose Flatt's parole was a decision made close in time to the parole hearing in light of all the circumstances rather than a prearranged deal made prior to the trial as Petitioner alleges.

Alternatively, Respondent argues that even if Petitioner's evidence is sufficient to create an inference of the existence of a deal between Flatt and the State at the time of the trial, it is still insufficient to establish Petitioner's claim of actual innocence given the other corroborative evidence available for consideration by the jurors.

A miscarriage of justice occurs where "a constitutional violation has probably resulted in the conviction of one who is actually innocent...." Schlup v. Delo, 513 U.S. 298, 321 (1995). A petitioner must "support his allegations of constitutional error with

new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." Id. at 324. To establish that he is actually innocent, "a petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." Id. at 327.

> The meaning of actual innocence ... does not merely require a showing that a reasonable doubt exists in the light of the new evidence, but rather that no reasonable juror would have found the defendant guilty. It is not the district court's independent judgment as to whether reasonable doubt exists that the standard addresses; rather the standard requires the district court to make a probabilistic determination about what reasonable, properly instructed jurors would do. Thus, a petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.

Id. at 329.

Here, Petitioner fails to establish actual innocence because the Court is not persuaded that the new evidence he submits—that Flatt was released early on parole—would more likely than not convince all properly instructed, reasonable jurors not to find Petitioner guilty beyond a reasonable doubt. While Flatt's early parole may raise reasonable doubt about the possibility of a prearranged deal between him and the State and about his credibility as a witness among some reasonable jurors, this is insufficient to establish actual innocence.

The Court realizes that some reasonable jurors may believe that Flatt's early parole resulted from his good behavior while in prison, not a prearranged deal. Other reasonable jurors may still have found Flatt credible in spite of a prearranged deal with the State because of independent corroborative evidence presented at trial[12] and the extensive cross-examination of Flatt at trial.

Because Petitioner procedurally defaulted the required mental state for first-degree murder portion of his sufficiency of the evidence claim and fails to overcome this default through showing cause and prejudice or a fundamental miscarriage of justice, Respondent is entitled to summary judgment on this claim.

C. Part Three - The Jury Was Misled By Terry Wayne Flatt's Testimony That He Had No Guarantee for Preferential Treatment in Exchange for His Testimony Against Petitioner. (Docket Entry No. 53 ¶¶ 36–46)

In his amended habeas petition, Petitioner contends that his due process rights were violated because his accomplice, Terry Flatt, presented false testimony at trial when Flatt told the jury that the prosecution had given him no assurances or expectations for preferential treatment or early release in exchange for testifying against Petitioner in violation of the Sixth, Eighth, and Fourteenth Amendments. He had made a deal that he would receive a twenty-five year sentence, and when he was eligible for early release in 1990, the District Attorney did not oppose his release. He was

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[12] On direct appeal, the Tennessee Supreme Court noted several pieces of evidence corroborated Flatt's testimony. See supra Part V(B)(1), quoting Henley, 774 S.W.2d at 913–14.

not released in 1990 but was released in March of 1991 after only serving five years.

Respondent's summary judgment motion maintains that Petitioner procedurally defaulted this argument by not raising it in the state courts on direct appeal, on post-conviction, or in his motion to re-open his post-conviction proceeding. In response, Petitioner asserts that his claim is not barred from federal habeas review despite not having been raised in the state courts because false testimony is not a legitimate state interest. Alternatively, Petitioner claims that he can establish cause and prejudice to overcome procedural default. Respondent alleges that Petitioner fails to plead any facts that would support a finding of cause and prejudice to overcome procedural default.

1. **Whether Petitioner procedurally default his claim**

Petitioner does not deny that he failed to raise his false testimony claim before the state courts. Instead, relying solely on Rickman v. Dutton, 864 F.Supp. 686, 706 (M.D. Tenn. 1994), Petitioner asserts that his claim cannot be procedurally defaulted because enforcing such a default in the context of false testimony serves no legitimate state interest and rewards the State for engaging in deceptive activities.

As a preliminary matter, the Court notes that while a decision by a fellow judge in the same federal district court may be cited as persuasive authority, such a decision is not binding on other judges in the same or in other federal district courts. Fishman & Tobin, Inc. v. Tropical Shipping & Constr. Co., 240 F.3d 956, 965 (11th Cir. 2001); Starbuck v. City & County of San Francisco, 556 F.2d 450, 457 n.13 (9th Cir. 1977).

Rickman relied solely on Henry v. Mississippi, 379 U.S. 443 (1965), in which the Supreme Court on direct

appeal, not habeas review, held in dictum that "a litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the state's insistence on compliance with its procedural rules serves a legitimate state interest." Henry, 379 U.S. at 447.

While still accorded deference, Supreme Court dictum is, at best, persuasive authority, not binding precedent. Maryland v. Wilson, 519 U.S. 408, 412–13 (1997); Montana v. Egelhoff, 518 U.S. 37, 56 (1996); see also United States v. Tucker, 28 F.3d 1420, 1426–27 (6th Cir. 1994). Moreover, the dictum in Henry has been heavily criticized as: (1) ambiguous, (2) lacking further development, and (3) suspect. See, e.g., 1 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law § 2.14 (3d ed. 1999) ("Henry has not had any significant growth in the law; its future development remains unclear and it may simply stand as a sport; having no more progeny than a mule."); 16B Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 4028 (2d ed. 1996) (Henry's ambiguous, "legitimate state interest" test, which despite ample opportunity has not been clarified in subsequent Supreme Court rulings, may "unduly subordinate state interests."); Id. at § 4020 (Henry is "deeply suspect." "Later decisions, over a period now measured in decades, are more remarkable for frequently omitting any reference to the Henry decision than for clarifying it.... It is even possible to suspect that the Court may have been influenced by an unspoken concern for the fairness of the prosecution of a local civil rights leader for a relatively trivial offense. An ambiguous opinion could have served such concerns well, without leaving any costly legacy.")

Given that Petitioner's legal authority relies ultimately on ambiguous, undeveloped Supreme Court

dictum, instead of binding precedent, the Court rejects Petitioner's argument that he did not default his false testimony claim.

2. Whether Petitioner establish cause and prejudice to overcome procedural default

Petitioner maintains that the presentation of Flatt's alleged false and misleading testimony regarding his plea bargain by the prosecution constitutes sufficient cause and prejudice to overcome procedural default. Respondent counters that Petitioner fails to plead any facts that would support a finding of cause and prejudice to overcome procedural default.

a. Cause

The record shows and Petitioner acknowledges that he did not raise his false and misleading testimony claim before the state courts but rather raised it in the first instance in his amended habeas petition. (Petitioner's Resp. to Respondent's Statement of Material Facts in Support of Mot. for Summ. J., Docket Entry No. 94 at 2). Pursuant to Tennessee Code § 40-30-202,[13] Petitioner is now barred from raising this claim in state court. By failing to exhaust his false testimony claim in the state courts, Petitioner defaulted it.

Petitioner may overcome his default if he can demonstrate cause for his state-court default and

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[13] Tennessee Code 40-30-202, the statute of limitations for filing post-conviction petitions, imposes a one-year filing period from the date of the final action of the highest state appellate court to which an appeal was taken except where the petition asserts: (1) a new constitutional right not recognized as existing at the time of trial, (2) new scientific evidence establishing innocence, or (3) relief from an enhanced sentence based on a previous conviction where the previous conviction is subsequently determined to have been invalid.

prejudice therefrom. The law provides that cause turns on whether Petitioner can demonstrate that a substantial reason external to himself thwarted his efforts to comply with state procedural rules. Relying on one Supreme Court and a few lower federal court opinions, Petitioner contends, however, that any misleading of a criminal defendant by state agents, via presentation of false testimony or the withholding of evidence, establishes sufficient cause to excuse a procedural default. Here, Petitioner maintains that adequate cause was established simply by the prosecution allowing Flatt to present false and misleading statements about his plea-bargain agreement.

Petitioner's argument fails because it urges a broader standard for establishing cause for procedural default than the law provides. All of Petitioner's cases relied on a reason external to the prisoner to establish cause. See, e.g., Strickler, 527 U.S. at 282–89 (cause established where prosecutor's open file policy impeded the prisoner's access to exculpatory material because the prosecutor's file did not contain all it purported to contain and the prosecution misrepresented to the prisoner that the prisoner had received everything the prosecution knew before trial); Fairchild v. Lockhart, 979 F.2d 636, 640 (8th Cir. 1992) (cause established where prosecution misrepresented that he had turned over his entire file to prisoner for trial); Bliss v. Lockhart, 891 F.2d 1335, 1341 (8th Cir. 1990) (cause established where prosecutor interfered with the disclosure of full evidence by expressly or implicitly telling a witness to avoid testifying favorably for the defendant on a particular subject at trial); Julius v. Jones, 875 F.2d 1520, 1521–26 (11th Cir. 1989) (cause established where prosecution failed to produce all exculpatory evidence requested by the defense for

trial); Rickman, 864 F. Supp. at 695–96, 705, 707 (cause established where prosecution: (1) allowed a witness to falsely testify at trial that he might receive the death penalty and was not given any consideration for his testimony, despite being promised no death penalty, a trial severed from his co-defendants, and implied immunity; and (2) impeded prisoner's access to exculpatory evidence requested by the prisoner before trial by responding that prisoner had no right to prosecution's plea-bargain file).

However, Petitioner's case is distinguishable from the cases he cites in that Petitioner neither alleges nor proves that he was unable to discover the facts surrounding Flatt's plea-bargain agreement when Petitioner's case was before the state courts, nor that the prosecutor impeded him from discovering any evidence related to the plea-bargain. Hence, Petitioner has not established a justifiable reason for his failure to timely raise his false and misleading testimony claim in the state courts. Instead, he argues the merits of the claim. Yet, the Court cannot review Petitioner's defaulted claim until he establishes cause to overcome his default, which he has not done.

b. Prejudice

Because Petitioner neither pleads nor proves any facts that establish cause for his procedural default, the Court need not address the prejudice prong of the procedural default override test. And because Petitioner procedurally defaulted this claim, Respondent is entitled to summary judgment on it.

D. Part Four - Exculpatory Evidence Was Withheld From Counsel For Petitioner in Violation of His Constitutional Rights. (Docket Entry No. 53 ¶¶ 47–61)

In his amended petition, Petitioner alleges that the State violated his due process rights, in violation of the

Sixth, Eighth, and Fourteenth Amendments, by improperly, withholding exculpatory evidence related to: (1) Flatt's plea-bargain agreement with the State,[14] (2) forensic testing of physical evidence at the crime scene, (3) the autopsy of the victims, and (4) administration of mind-dulling medications to Petitioner by the State throughout the trial.

Respondent contends that because Petitioner did not raise the first three allegations of his improperly withheld, exculpatory evidence claim in the state courts, they are procedurally defaulted. Respondent further asserts that Petitioner fails to plead any facts to support a finding of cause and prejudice to overcome this default. Noting that the Tennessee Court of Criminal Appeals determined that Petitioner waived the medication argument[15] and also found it lacked merit, Respondent urges that the decision of that court was neither contrary to, nor an unreasonable application of, clearly established federal law as determined by the United States Supreme Court and that the decision was based on a reasonable determination of the facts in light of the evidence contained in the record at trial and on post-conviction.

Petitioner's improperly withheld, exculpatory evidence claim will be addressed by the two groupings into which the allegations of this claim fall: (1), (2), and (3) (i.e., plea-bargain agreement, forensic testing, and autopsy of the victims) were allegedly procedurally defaulted; and (4) (i.e. administration of mind-dulling

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[14] Petitioner distinguishes this claim of withholding evidence from his above claim of presenting false and misleading testimony.

[15] The Tennessee Court of Criminal Appeals gave no grounds for waiver of this specific issue. However, this holding followed earlier holdings of waiver for failure to raise issues on direct appeal based on a state procedural rule.

medications) was adjudicated on the merits by the state courts.

1. **Whether Petitioner procedurally defaulted (1), (2), and (3) of the improperly withheld, exculpatory evidence claim (Docket Entry No. 53 ¶¶ 48–59)**

Respondent contends that Petitioner procedurally defaulted the first three allegations of his improperly withheld, exculpatory evidence claim, i.e. (1) Flatt's plea-bargain agreement with the State, (2) forensic testing of physical evidence at the crime scene, and (3) the autopsy of the victims because Petitioner did not raise these issues in the state courts. Respondent further contends that Petitioner fails to plead any facts to overcome this default. The record shows, and Petitioner agrees, that Petitioner did not raise these three allegations before the state courts. Instead, he raises them for the first time in his amended habeas petition. (Petitioner's Resp. to Respondent's Statement of Material Facts in Support of Mot. for Summ. J., Docket Entry No. 94 at 2–5).

Petitioner is now barred from raising these allegations in state court pursuant to Tennessee Code § 40-30-202, and therefore they are procedurally defaulted from being alleged in the federal habeas context unless Petitioner overcomes procedural default by demonstrating cause and prejudice.

Here, Petitioner does not plead or prove any facts to establish cause and prejudice to overcome his procedural default for (2) forensic testing or (3) autopsy evidence, so the Court may not review either of these allegations of his claim.[16]

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[16] The Court also notes that while Petitioner raised the autopsy evidence allegation in his amended habeas petition, he failed to address it in his response to Respondent's Motion for Summary

Petitioner contends only in a footnote in his Response, that the Flatt plea-bargain agreement portion of his improperly withheld, exculpatory evidence claim (Docket Entry No. 53 ¶¶ 48–56) was not procedurally defaulted because "the prosecution was obligated to disclose any such exculpatory evidence and [Petitioner] was not required to police the prosecution's compliance with the Constitution." (Petitioner's Resp. in Opp'n to Mot. for Summ. J., Docket Entry No. 92 at 44–45 n.17).

An argument raised simply in a single footnote without citation to legal authority is waived. Calvert v. Wilson, 288 F.3d 823, 836–37 (6th Cir. 2002) (Cole, J., concurring); see also General Star Nat'l Ins. Co. v. Administratia Asigurarilor de Stat, 289 F.3d 434, 441 (6th Cir. 2002); United States v. Toney, 27 F.3d 1245, 1249 (7th Cir. 1994); Licari v. Ferruzzi, 22 F.3d 344, 348–49 (1st Cir. 1994).

Petitioner's cause argument fails because he raises it in a perfunctory manner, i.e. in a single sentence in a solitary footnote, and cites no supporting authority or specific constitutional provision or amendment. Moreover, Petitioner's footnote only cross-references a portion of his brief addressing the merits of several ineffectiveness of counsel allegations, not procedural default. Petitioner's use of supra instead of infra with his cross-reference suggests that he may have intended to cross-reference the procedural default argument (non-legitimate state interest) that he raised pursuant to his alleged false testimony claim. See supra Part V(C)(1). If so, this is of no avail to Petitioner because that argument fails also. See id.

Judgment. Because Petitioner failed to respond to Respondent's summary judgment argument, the Court deems this portion of Petitioner's claim waived.

2. Whether exculpatory evidence about Petitioner's medication by the State was improperly withheld from Petitioner's counsel (Docket Entry No. 53 ¶¶ 60–61)

Respondent urges that the decision of the state courts that the State did not improperly withhold exculpatory evidence about Petitioner's medicated state during trial from his trial counsel was neither contrary to, nor an unreasonable application of, clearly established federal law as determined by the United States Supreme Court and was based on a reasonable determination of the facts in light of the evidence contained in the record at trial and on post-conviction.

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment...." Brady v. Maryland, 373 U.S. 83, 87 (1963). Brady evidence does not include "facts otherwise known to the defense." Giles v. Maryland, 386 U.S. 66, 98 (1967) (Fortas, J., concurring).

Reaching the merits of Petitioner's claim that exculpatory evidence about his medications were improperly withheld from his trial counsel, the Tennessee Court of Criminal Appeals made three findings of fact: (1) there was no proof in the record that the prosecution was aware of the effects of the medications Petitioner was taking during trial; (2) there was no proof that the only person who arguably knew about the behavioral effects of the medications, the prescribing physician, was under the control of the prosecution; and (3) Petitioner did not contend that he was unaware that he was medicated. 1996 WL 234075, at *5.

Applying State v. Marshall, 845 S.W.2d 228 (Tenn. Crim. App. 1992) to these facts, the Tennessee Court of Criminal Appeals concluded that there was no Brady

violation because the prosecution is not required to disclose information that: (1) the accused already possesses, or (2) the prosecution does not possess or control. Id.

Because Petitioner does not contest the findings of fact by the state court, the Court must give these findings deference. Campbell v. Coyle, 260 F.3d 531, 539 (6th Cir. 2001), cert. denied, ____ U.S. ____, 122 S.Ct. 1448 (2002). Given these facts, the Court is persuaded that the decision of the Tennessee Court of Criminal Appeals was neither contrary to, nor an unreasonable application of, Brady and Giles. Accordingly, Respondent is entitled to summary judgment.

E. Part Five - Petitioner Was Denied the Effective Assistance of Counsel at the Guilt and Sentencing Phases of His Trial. (Docket Entry No. 53 ¶¶ 62–81)[17]

In ¶¶ 62–81 of his amended habeas petition, Petitioner presents, at both the guilt and penalty phases of trial on direct appeal, and on post-conviction appeal, an orderly list of alleged instances of ineffective assistance of counsel, occurring pre-trial. Petitioner alleges these errors violate the Sixth, Eighth, and Fourteenth Amendments to the Constitution.

Respondent's Answer and Motion for Summary Judgment counters these allegations, point by point, in an easy-to-follow, organized manner. However, Petitioner's response to Respondent's Answer and Motion for Summary Judgment, generally, does not attempt to rebut Respondent's summary judgment

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[17] Although the title to Part Five in the amended habeas petition only refers to the guilt and sentencing phases of trial, Petitioner raises allegations of ineffective assistance of counsel on direct appeal and on post-conviction appeal as well.

arguments. Rather, it focuses on arguing the merits of Petitioner's ineffective assistance of counsel claim, expanding some of the allegations beyond both what Petitioner raised in his amended habeas petition and what Respondent addressed in his Answer and Motion for Summary Judgment. Moreover, Petitioner's response brief: (1) is not organized to parallel the structured argument presented in both Petitioner's amended habeas petition and Respondent's Answer and Motion for Summary Judgment, (2) makes no reference to the corresponding paragraphs in the amended habeas petition, and (3) often subtly buries Petitioner's expanded allegations within other arguments. Because Respondent filed no reply brief to Petitioner's response, Respondent does not address Petitioner's additional arguments.

Petitioner's lack of adherence to the organized format he initially laid out in his amended habeas petition has made it painstakingly difficult for the Court to track the many instances of ineffectiveness of counsel that Petitioner alleges and borders on forfeiture of many of his allegations. See United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991). "Judges are not like pigs, hunting for truffles buried in briefs." Id.

In addition, Petitioner's response brief raises two preliminary questions: (1) whether the ineffective assistance of counsel allegations that Petitioner raises beyond the scope of his amended habeas petition and of Respondent's Answer and Motion for Summary Judgment should be addressed by the Court, and (2) the consequences of Petitioner's general failure to rebut Respondent's summary judgment arguments.

1. Allegations beyond the scope of the amended habeas petition

In his response brief to Respondent's Answer and Motion for Summary Judgment, Petitioner raises the following allegations of ineffective assistance of counsel beyond the scope of the amended habeas petition: (1) during the trial, Petitioner's counsel failed to object to the pistol and to prior bad acts;[18] (2) during the trial, counsel failed to move to strike the pistol, polygraph, or prior bad acts;[19] (3) during the trial, counsel failed to move for a curative instruction on the prior bad acts;[20] (4) counsel never developed a strategy in this case; (5) before the trial counsel failed to move for a continuance due to pretrial publicity[21]; (6) counsel presented no voluntary intoxication defense during trial or on direct appeal[22]; and (7) counsel failed to object to the procedure for the jury's verdict on direct appeal.[23] Clearly, Petitioner did not raise all the

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[18] The amended habeas petition only raises counsel's failure to object to a reference to a polygraph test (Docket Entry No. 53 ¶ 77).

[19] The amended habeas petition only raises failure to file a pretrial motion in limine for all three (Docket Entry No. 53 ¶ 69).

[20] The amended habeas petition only raises failure to move for a limiting (curative) instruction for the polygraph and pistol (Docket Entry No. 53 ¶¶ 76–77).

[21] The amended habeas petition only raises failure to file a motion for change of venue. (Docket Entry No. 53 ¶ 68).

[22] The amended habeas petition only raises failure to request jury instructions on voluntary intoxication. (Docket Entry No. 53 ¶ 81(h)).

[23] The amended habeas petition only raises the jury's improper verdict form. (Docket Entry No. 53 ¶ 81(1)).

grounds for relief available to him in his amended habeas petition.[24]

Although technically civil actions, habeas proceedings are really a hybrid of an independent civil disposition of a completed criminal proceeding. See Santana v. United States, 98 F.3d 752, 754 (3d Cir. 1996); see also Harris v. Nelson, 394 U.S. 286, 293–94 (1969) (although habeas cases are "civil" in nature, that label is "gross and inexact"). In light of their hybrid nature, habeas cases are subject to the Federal Rules of Civil Procedure only to the extent that these rules are not inconsistent with the rules governing habeas cases. Santana, 98 F.3d at 755; Rules Governing § 2254 Cases In the United States District Courts, Rule 11; see also Schlanger v. Seamons, 401 U.S. 487, 490 n.4 (1971) (although technically civil, habeas cases are not automatically subject to the rules governing civil actions).

Rule 2 of the Rules Governing § 2254 Cases states that a habeas petition "shall specify all the grounds for relief which are available to the petitioner and of which he has or by the exercise of reasonable diligence should have knowledge...." Rule 5 of the Rules Governing § 2254 Cases commands that the answer to the habeas petition must respond to the allegations raised in the petition, which is what Respondent did here.

However, the Rules Governing § 2254 Cases do not indicate what procedures or standards are to be followed in the situation presented here, *i.e.*, an

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[24] Petitioner clearly had knowledge of these issues when he prepared his amended petition because the record shows he raised them in his state post-conviction appeal. (See Addendum 18, Appellant's Br., at 56–64). In fact, many of the additional allegations here are identical to allegations Petitioner raised in his state post-conviction appellate brief.

attempt to amend the pleadings through a response to a summary judgment motion.[25] "When these rules are otherwise silent, Rule 11 compels us to follow the Federal Rules of Civil Procedure in disposing of habeas corpus petitions." McDonnell v. Estelle, 666 F.2d 246, 249 (5th Cir. 1982).

Because an answer is a responsive pleading and Respondent served an answer before Petitioner raised these additional or expanded allegations, Petitioner was barred from amending his habeas petition without leave of the Court or Respondent's written consent. Fed. R. Civ. P. 7, 15(a). And because it was procedurally improper for Petitioner to assert new or amended allegations in his response to Respondent's Answer and Motion for Summary Judgment, Respondent did not need to address the new or amended allegations[26] and the Court will not consider them.

2. Consequences of Petitioner's failure to rebut Respondent's summary judgment arguments

Respondent raises a summary judgment argument for all of the ineffective assistance of counsel allegations alleged in Parts Five and Six of the habeas petition. However, except in response to Respondent's Statement of Material Facts in Support of Motion for Summary Judgment for a few alleged procedurally defaulted allegations, Petitioner fails to respond to

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[25] Habeas Corpus Rule 9(b), which addresses abuse of the writ, is inapplicable here because the petition here is not a second or successive petition.

[26] Since these allegations were an attempt to expand the complaint and were not a response to Respondent's motion, Respondent could not have replied to them without the Court ordering him to do so. See Fed. R. Civ. P. 7(a).

these arguments. Instead, Petitioner attempts to re-litigate the claim he raised below in the state courts.

Because the purpose of federal habeas review is not to re-try the case presented in the state courts, the Court will not review attempts to re-litigate Petitioner's claims. See Bell v. Cone, ___ U.S. ____, ____, 122 S.Ct. 1843, 1849 (2002) ("The Antiterrorism and Effective Death Penalty Act of 1996 modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials'...."); Coyle, 260 F.3d at 544 (on habeas review, petitioner cannot simply urge a different interpretation of the evidence). And given that Petitioner waived nearly all of his ineffective assistance of counsel allegations by failing to respond to Respondent's summary judgment arguments, the Court need only review the sufficiency of Respondent's summary judgment arguments.

Respondent asserts that Petitioner's ineffective assistance of counsel allegations: are either (a) conclusory, (b) procedurally defaulted, (c) non-cognizable, or (d) were properly decided by the state courts. The Court will review Petitioner's ineffective assistance allegations by these categories.

a. Conclusory allegations

Respondent's Motion for Summary Judgment alleges that Petitioner's allegations in ¶¶ 70–72 and 78–79 of the amended habeas petition are conclusory for failing to allege particularized, specific facts in support of the claim of ineffective assistance of counsel. In addition, Respondent maintains that the allegation in ¶ 69 is conclusory if applied beyond its scope. Petitioner does not rebut these arguments.

The amended petition at ¶¶ 70–72, and 78–79 state:

70. Counsel failed to rehabilitate jurors who were otherwise competent to serve as trial jurors but who were uneasy about sitting on a capital case.

71. Counsel failed to inquire on voir dire about jurors' exposure to adverse pretrial publicity.

72. Counsel did not use peremptory challenges to remove prospective jurors who otherwise would have been biased against Petitioner.

78. Counsel failed to fully cross-examine Flatt on his prior inconsistent statements.

79. Counsel failed to request instructions on mitigating factors at the sentencing phase of trial.

Respondent contends that: (1) the allegations in ¶¶ 70–72 are conclusory because they do not set forth the names of the specific jurors and the indicators of alleged bias; (2) the allegation in ¶ 78 is conclusory because it fails to specify what prior inconsistent statements of Flatt were not addressed on cross-examination; and (3) the allegation in ¶ 79 is conclusory because it fails to specify what special instructions on mitigation should have been given and how their absence caused any prejudice to Petitioner. Because the Court finds Respondent's arguments persuasive, it concludes that Petitioner's allegations in ¶¶ 70–72 and 78–79 are conclusory and accordingly shall grant Respondent summary judgment.

Petitioner's allegation in ¶ 69 asserts:

69. Counsel failed to file appropriate motions in limine, including a motion concerning a purported voice stress exam of Petitioner, an alleged prior bad act of

> Petitioner, and a pistol which was irrelevant to the case but highly prejudicial.

Respondent contends that Petitioner's allegation in ¶ 69 is conclusory if applied to motions other than those specified therein. The Court agrees and addresses the non-conclusory aspects of the allegation in ¶ 69 under Part V of this Memorandum. (See infra Part Five(E)(2)(d)(2) at pages 92 and 93).

b. Procedurally defaulted claims

Respondent maintains that Petitioner procedurally defaulted the following allegations of the ineffective assistance of counsel claim by failing to properly raise them in the state courts:

(1) Petitioner's counsel failed to adequately and independently investigate forensic evidence (Docket Entry No. 53 ¶¶ 63–64);

(2) Petitioner's counsel failed to investigate mental health evidence that related to Petitioner's *mens rea* (part of Id. ¶ 65);

(3) Petitioner's counsel made several pre-trial errors (Id. ¶¶ 68, 70–72) ;

(4) Petitioner's counsel made errors during the guilt and sentencing phases of trial (Id. ¶¶ 76, 78–79); and

(5) Petitioner's counsel made errors on direct appeal (Id. ¶ 81).

Procedural default stems from failing to present habeas claims in state courts before seeking federal relief. Coleman, 501 U.S. at 731–32; see also Teague, 489 U.S. at 297–98. Petitioner may overcome a procedural default by demonstrating cause and prejudice or a fundamental miscarriage of justice. Edwards, 529 U.S. at 451.

Respondent's arguments will be addressed in three groups determined by the rationale for default raised: (1) failure to raise specific facts in state courts,

(2) failure to raise issue on post-conviction in state courts, and (3) failure to raise issue in Rule 11 Application.[27]

(1) *Failure to raise specific facts in state courts.* Respondent alleges that the forensic evidence portion of Petitioner's ineffective assistance claim is procedurally defaulted because although Petitioner raised a single, generalized allegation of lack of investigation as portion of his ineffective assistance of counsel claim on post-conviction appeal, Petitioner did not raise the specific factual predicates before the state courts that he raises here in his two factual allegations in ¶¶ 63–64. Respondent further alleges that Petitioner presents no argument to override this defaulted claim.

Petitioner acknowledges that he only raised a single, generalized allegation of lack of investigation as portion of his ineffective assistance of counsel claim before the state courts. (See Petitioner's Resp. to Respondent's Statement of Material Facts in Support of Mot. for Summ. J., Docket Entry No. 94 at 5–6). And Petitioner provides no excuse for failing to raise a more particularized claim before the state courts.

"Before a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court." O' Sullivan, 526 U.S. at 842; accord 28 U.S.C. § 2254(b)(1)(A); Rust v. Zent, 17 F.3d 155, 160 (6th Cir. 1994). Exhaustion requires that a state prisoner's habeas claims must have been fairly presented to the state courts. Picard v. Connor. 404 U.S. 270, 275 (1971); see also McMeans, 228 F.3d at 681

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[27] Rule 11 of the Tennessee Rules of Appellate Procedure governs appeals from a final decision of the Tennessee Court of Criminal Appeals to the Tennessee Supreme Court.

(habeas claim is barred if not previously fairly presented to the state courts).

> In order to have fairly presented his federal claim to the state courts the petitioner must have informed the state court of both the factual and legal premises of the claim he asserts in federal court. Specifically, he must have set forth in state court all of the essential factual allegations asserted in his federal petition; if material factual allegations were omitted, the state court has not had a fair opportunity to rule on the claim.

Daye v. Attorney General, 696 F.2d 186, 191 (2d Cir. 1982) (citations omitted); see also McMeans, 228 F.3d at 681 ("A claim may only be considered 'fairly presented' if the petitioner asserted both the factual and legal basis for his claim to the state courts.")

The record shows that in his state petition for post-conviction relief, Petitioner merely asserted the following general allegation of failure to investigate: "Counsel failed to investigate and present all available evidence that would support Petitioner's claims of innocence...." (Addendum No. 13, Amended Pet. For Post Conviction Relief, at 2). And while Petitioner's post-conviction appellate brief presented some specific instances of alleged failure to investigate, failure to investigate forensic evidence was not mentioned. (See Addendum No. 18, Br. of Appellant, at 54–56). Thus, the record establishes that Petitioner did not fairly present the forensic evidence portion of his ineffective assistance of counsel claim before the state courts because he did not set forth all of the essential factual allegations there that he asserts here in his amended habeas petition. Accordingly, Petitioner failed to exhaust the forensic evidence portion of his ineffective assistance of counsel claim in the state courts.

Nonetheless, because Petitioner's unexhausted forensic evidence allegation no longer can be presented to the state courts pursuant to Tennessee Code § 40-30-202, it is deemed exhausted but procedurally barred from federal habeas review absent a showing of cause and prejudice or a fundamental miscarriage of justice. Because Petitioner makes no attempt to demonstrate cause and prejudice or a fundamental miscarriage of justice to overcome this state procedural default, the forensic evidence portion of his ineffective assistance of counsel claim is not cognizable.

(2) *Failure to raise issue on post-conviction in state courts.* Respondent alleges that: (1) the *mens rea* portion of Petitioner's allegation in ¶ 65 is procedurally defaulted because Petitioner did not raise *mens rea* on post-conviction appeal; and (2) Petitioner pleads no facts to overcome this default.

Petitioner acknowledges that he did not raise *mens rea* on post-conviction appeal. (Petitioner's Resp. to Respondent's Statement of Material Facts in Support of Mot. for Summ. J., Docket Entry No. 94 at 6). A review of the record confirms that this allegation was not raised before the state courts.

Because Tennessee Code § 40-30-202 precludes this unexhausted allegation from now being raised before the state courts, it is deemed exhausted and procedurally barred from habeas review absent a showing of cause and prejudice or a fundamental miscarriage of justice. Because Petitioner makes no attempt to demonstrate cause and prejudice or a fundamental miscarriage of justice to overcome his state procedural default, the *mens rea* portion of Petitioner's allegation in ¶ 65 cannot be reviewed by a federal habeas court.

(3) *Failure to raise issue in Rule 11 application.* Relying on O'Sullivan, Respondent alleges that Petitioner's allegations of pre-trial (Docket Entry No. 53 ¶¶ 68, 70–72),[28] guilt and sentencing (Id. ¶¶ 76, 78–79), and direct appellate (Id. ¶ 81) errors are procedurally defaulted due to Petitioner's failure to present these portions of his ineffective assistance of counsel claim in his Rule 11 application to the Tennessee Supreme Court. Petitioner: (1) fails to acknowledge or rebut Respondent's argument for his pre-trial error allegation in his amended petition that counsel failed to change venue based on adverse pre-trial publication (Id. ¶ 68), (2) disagrees that he failed to assert the allegation about the limiting instruction regarding the pistol (Id. ¶ 76), but acknowledges that he failed to raise other alleged errors (Id. ¶¶ 78–79) from the guilt and sentencing phases of his trial in his Rule 11 application, and (3) asserts that he preserved his direct appellate error allegation (Id. ¶ 81) with the following blanket statement at the end of his Rule 11 application:

> To preserve issues for possible later review by a federal court under a habeas corpus action, Mr. Henley hereby incorporates by reference any and all objections or assignments of erroneous action by any and all participants in this case, made at any point on direct or collateral appeal, into this Application for Permission to Appeal....

(Petitioner's Resp. to Respondent's Statement of Material Facts in Support of Mot. for Summ. J., Docket

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[28] Because the Court finds allegations No. 70-72 to be conclusory and denies them on that ground, it need not address whether they are procedurally defaulted. (See supra Part V(E)(2)(a)).

Entry No. 94 at 6–7 (quoting Addendum No. 25, Appellant's Application for Permission to Appeal, at 31)).

Rule 11 of the Tennessee Rules of Appellate Procedure governs applications to the Tennessee Supreme Court for permission to appeal adverse decisions of the Tennessee Court of Criminal Appeals. In O'Sullivan, the United States Supreme Court held that in order for a state prisoner to exhaust his federal claims in state courts pursuant to § 2254(c),[29] the prisoner must invoke one complete round of the state's established appellate review process, including discretionary petitions for review by the state's Supreme Court, when such review is part of the ordinary appellate review process in the state. 526 U.S. at 845, 847.

However, on June 28, 2001, the Supreme Court of Tennessee announced a new rule regarding the exhaustion of state remedies for criminal defendants,[30] which reads in pertinent part:

> In all appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967, a litigant shall not be required to ... file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies

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[29] § 2254(c) provides: "An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

[30] Rule 39 was announced subsequent to the submission of briefs by the parties in this case.

> respecting a claim of error. Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court and relief has been denied, the litigant shall be deemed to have exhausted all available remedies available for that claim.

Rule 39, Rules of the Supreme Court of Tennessee. Furthermore, a 2002 Advisory Commission Comment to Rule 11 of the Tennessee Rules of Appellate Procedure explains how Rule 11 applies within the framework of Rule 39 of the Supreme Court of Tennessee and O'Sullivan:

> Pursuant to Rule 39, Rules of the Tennessee Supreme Court, an appellant in a criminal case will be deemed to have exhausted all available state remedies respecting a claim of error following an adverse decision by the Court of Criminal Appeals without the necessity of filing a petition to rehear or an application for permission to appeal under Tenn. R. App. P. 11(a). The Tennessee Supreme Court adopted Rule 39 in response to O'Sullivan v. Boerckel, 526 U.S. 838 (1999), in which the U.S. Supreme Court held that in order to satisfy the exhaustion requirement of collateral federal review under 28 U.S.C. § 2254, a state prisoner must present his or her claims to the state supreme court for discretionary review absent a state court rule or decision to the contrary.

Whether this advisory comment is a proper interpretation of O'Sullivan is arguable as the O'Sullivan majority stated that exhaustion "turns on an inquiry into what procedures are 'available' under state law. In sum, there is nothing in the exhaustion doctrine requiring federal courts to ignore a state law or rule providing that a given procedure is not

available." 526 U.S. at 847–48. And Justice Souter, in a concurring opinion, noted that the Supreme Court had not addressed "whether we should construe the exhaustion doctrine to force a State, in effect, to rule on discretionary review applications when the State has made it plain that it does not wish to require such applications before its petitioners may seek federal habeas relief." Id. at 849.

To the Court's knowledge, the Sixth Circuit Court of Appeals has not addressed this question either. While federal district courts in the Third Circuit, examining a Pennsylvania state-court rule similar to Tennessee Supreme Court Rule 39, upheld such a rule, they recognized that the language and intent of the rule raised many difficult constitutional questions. See, e.g., Mattis v. Vaughn, 128 F. Supp.2d 249 (E.D. Pa. 2001); Blasi v. Attorney General, 120 F. Supp.2d 451 (M.D. Pa. 2000).

For instance, Blasi noted that such a rule "conflate[s] making a remedy unavailable with waiving the requirement of exhaustion with respect to an available remedy. The basic idea is that the remedy is available but the petitioner need not avail himself or herself of [it]." 120 F. Supp.2d at 468. The language used in the rule is "to the effect that the petitioner need not apply for discretionary review to have been 'deemed' to have exhausted state remedies. The crux of the matter is that it is the federal courts which do the 'deeming,' not the state courts." Id. Blasi further noted that pursuant to § 2254(b)(3), only the executive branch of state government has the power to waive the exhaustion requirement.[31] Id. at 469. And Mattis

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31 § 2254(b)(3) provides: "A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance

noted that a state court rule directing a federal court to deem a claim exhausted in the state courts would appear to violate the Supremacy Clause of the Sixth Amendment. 128 F. Supp.2d at 259.

Despite these concerns, Mattis concluded that Pennsylvania's rule was valid because it construed the rule as declaring discretionary review was "unavailable." 128 F. Supp.2d at 259. To the contrary, Blasi concluded that discretionary review was still available, but, nevertheless, held that the state court rule was valid because it removed an application for discretionary review from one complete round of Pennsylvania's established appellate review process.[32] 120 F. Supp.2d at 469.

Dicta from O'Sullivan in which the majority cited two cases invoking state-court rules from Arizona and South Carolina,[33] combined with remarks from concurring and dissenting opinions in O'Sullivan, suggest that a state court rule could effectively waive the exhaustion requirement by making the process "unavailable" or removed from one complete round of the state's appellate review process. See 526 U.S. at 847 (majority); id. at 849–50 (Souter, J., concurring); id. at 861–62, 864 (Stevens, J., and Breyer, J., dissenting).

The Court declines to decide whether Rule 39 of the Tennessee Supreme Court makes discretionary review

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upon the requirement unless the State, through counsel, expressly waives the requirement."

[32] In so ruling, Blasi adopted the holding of the Ninth Circuit Court of Appeals in Swoopes v. Sublett, 196 F.3d 1008 (9th Cir. 1999), a case that was remanded by the Supreme Court for further consideration in light of its decision in O'Sullivan.

[33] In re Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases, 321 S.C. 563, 471 S.E.2d 454 (1990); State v. Sandon, 161 Ariz. 157, 777 P.2d 220 (1989).

unavailable or removes it from one complete round of Tennessee's established appellate review process because: (1) Rule 39, on its face, raises serious constitutional issues not briefed by the parties; and (2) the claims before the Court are resolvable on alternate grounds. (See infra Parts V(E)(2)(d)(2) (Docket Entry No. 53 ¶ 68), V(E)(2)(d)(3) (Id. ¶ 76), and V(E)(3) (Id. ¶ 81); supra Part V(E)(2)(a) (Id. ¶¶ 78–79)).

c. Non-cognizable claims

Respondent contends that to the extent that Petitioner's allegation of ineffective assistance of counsel for failure to raise "any and all claims raised in this petition at trial, on direct appeal, or in post-conviction proceedings" (Docket Entry No. 53 ¶ 80) includes post-conviction errors, that portion of the claim is not cognizable as a basis for habeas relief, nor is there a constitutional right to counsel in post-conviction proceedings.

"There is no constitutional right to an attorney in state post-conviction proceedings. Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings." Coleman, 501 U.S. at 752 (citations omitted). Respondent is correct that any allegations Petitioner raises of post-conviction ineffective assistance are non-cognizable because there is no constitutional right to an attorney in state post-conviction proceedings.

However, Respondent raises no argument against the remainder of Petitioner's allegation in ¶ 80, *i.e.*, counsel was ineffective for failing to raise any and all allegations raised in this petition at trial and on direct appeal. Accordingly, the Court cannot grant Respondent summary judgment on the remainder of his allegation in ¶ 80. Nonetheless, as the Court has found all of Petitioner's ineffective assistance of counsel

allegations waived, procedurally defaulted, or without merit, and has granted Respondent summary judgment on these allegations, this portion of Petitioner's ineffective assistance claim cannot stand. See Rule 2, Rules Governing Section 2254 Cases (habeas petition must specify grounds for relief plus the facts supporting each ground specified).

d. Claims properly decided by the state courts

Respondent alleges that the remaining allegations of Petitioner's ineffective assistance of counsel claim in ¶¶ 65–69 and 73–77, which were addressed by the state courts, were properly treated by the state courts, i.e. Respondent alleges that the decision of the state courts was neither contrary to, nor an unreasonable application of, clearly established federal law as determined by the United States Supreme Court and that the decision was based on reasonable determination of the facts in light of the evidence in the record at trial and on post-conviction.

For each remaining ineffective assistance of counsel allegation, Petitioner ignores Respondent's summary judgment arguments and fails to argue why his allegations meet either exception recognized in § 2254(d). Instead, Petitioner improperly attempts to re-litigate these allegations that he raised below in the state courts, often using verbatim arguments from his state appellate court briefs. Accordingly, these allegations are waived.

Nonetheless, the Court must examine each remaining allegation to determine whether Respondent is entitled to summary judgment as a matter of law. Because Petitioner does not challenge the findings of fact of the state courts, the Court must give these findings statutory deference on habeas review.

(1) *Failure to investigate and present mental health evidence relating to sentencing issues.* (Docket Entry No. 53 ¶¶ 65–67). In the amended habeas petition, Petitioner asserts that his counsel was ineffective for failing to (a) seek appointment of a mental health professional to investigate the existence of mitigating factors at sentencing and to evaluate Petitioner psychologically for the guilt phase of trial (Docket Entry No. 53 ¶ 65),[34] (b) investigate Petitioner's psychological background and make-up either through gathering documents and/or having Petitioner tested or evaluated (Id. ¶ 66), and (c) investigate Petitioner's drug use at or around the time of the offenses and history of drug use to present a voluntary intoxication defense at the guilt phase of trial and/or to present mental state as a mitigating factor at the sentencing phase of trial and to request appropriate instructions on such grounds (Id. ¶ 67).

On post-conviction appeal, the Tennessee Court of Criminal Appeals noted that Petitioner consistently and adamantly maintained that he had not been intoxicated at the time of the offenses. 1996 WL 234075, at *8. Thus, that court concluded that trial counsel's decision not to request a jury instruction on voluntary intoxication was reasonable. Id. As for counsel's alleged failure to investigate Petitioner's mental health and psychological background, the Tennessee Court of Criminal Appeals concluded that this was not ineffective assistance with respect to the guilt phase, but was for the sentencing phase. Id. at *12.

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[34] The Court excludes the *mens rea* portion of Petitioner's allegation in ¶ 65 because the Court has already determined that it was procedurally defaulted. (See supra Part V(E)(2)(b)).

On appeal from post-conviction to the Tennessee Supreme Court, however, the latter post-conviction holding regarding Petitioner's mental health and psychological background was reversed. 960 S.W.2d at 583. That court determined that because Petitioner adamantly insisted at trial that he was innocent, never abused drugs, and was not intoxicated on the day of the murders and that his farm had failed due to unpredictable weather and not mental health reasons as alleged by his counsel, Petitioner's counsel could not be faulted for failing to investigate Petitioner's mental health and psychological background or for failing to present a voluntary intoxication or mental health defense because "the evidence for which trial counsel is now faulted for not discovering and introducing would have been inconsistent with the defendant's own testimony and harmful to the defense theory throughout the trial." Id. Furthermore, the Tennessee Supreme Court noted that when reviewing the performance of trial counsel, courts must evaluate the challenged conduct from counsel's perspective at the time of trial rather than from hindsight. Id.

In reaching its decision, the Tennessee Supreme Court relied, in part, on Strickland v. Washington, 466 U.S. 668 (1984). Strickland counsels that in reviewing ineffective assistance, every effort should be made "to eliminate the distorting effects of hindsight." Id. at 689. Strickland also counsels that "when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." Id. at 691.

Because the Court is persuaded that the decision of the Tennessee Supreme Court was neither contrary to, nor an unreasonable application of, Strickland,

Respondent is entitled to summary judgment on the mental health evidence portion of the ineffective assistance of counsel claim (Docket Entry No. 53 ¶¶ 65–67).

(2) *Pre-trial errors.* The amended habeas petition alleges that Petitioner's trial counsel made numerous pre-trial errors (Docket Entry No. 53 ¶¶ 68–73). The Court will address only those allegations that have not already been dismissed as conclusory, *i.e.*, the Court will review only the allegations in ¶¶ 68–69 and 73. These allegations include: (i) failure to move for a change of venue (¶ 68), (ii) failure to file motions in limine concerning Petitioner's purported voice stress exam, an alleged prior bad act, and a pistol (¶ 69), and (iii) failure to hire an investigator or secure co-counsel (¶ 73). The Court will address each allegation in turn.

Failure to move for change of venue (¶ 68). Unlike the other allegations of ineffective assistance, Petitioner makes *no* mention of the change-of-venue allegation (¶ 68) of the pre-trial error portion of the ineffective assistance of counsel claim in his response brief to Respondent's Motion for Summary Judgment. Instead, Petitioner merely lists failure to move for a change of venue in a long list of alleged errors on direct appeal (Docket Entry No. 53 ¶ 81), an entirely separate portion of the ineffective assistance of counsel claim alleged in Part Five from the portion alleging pre-trial errors. (Petitioner's Resp. in Opp'n to Mot. for Summ. J., Docket Entry No. 92 at 69). By failing to respond to Respondent's argument about alleged pre-trial errors, Petitioner waives this allegation.

The Court also notes that the Tennessee Court of Criminal Appeals rejected Petitioner's argument that trial counsel's failure to move for a change of venue constituted ineffective assistance in the pre-trial stage

because that court viewed trial counsel's decision not to move for a change of venue as a valid tactical choice given trial counsel's preference that the trial be held where Petitioner had been born and raised. 1996 WL 234075, at *8.

In reaching its decision, the Tennessee Court of Criminal Appeals relied, in part, on Strickland's standard that to prevail on a claim of ineffectiveness of counsel, Petitioner must show that his counsel's performance fell below an objective standard of reasonableness. 466 U.S. at 687–88. That court also relied on Hellard v. State, 629 S.W.2d 4, 9–10 (Tenn. 1982) for the principle that deference must be given to informed strategic and tactical trial choices made by trial counsel. See also Strickland, 466 U.S. at 689 (defendant must overcome a strong presumption that trial counsel's conduct falls within a wide range of reasonable professional assistance).

Because the Court is persuaded that the decision of the Tennessee Court of Criminal Appeals was neither contrary to, nor an unreasonable application of, Strickland, Respondent is entitled to summary judgment on this portion of Petitioner's ineffective assistance of counsel claim.

Failure to file motions in limine concerning Petitioner's purported voice stress exam, an alleged prior bad act, and a pistol (¶ 69). As to Petitioner's claim that trial counsel was ineffective for failing to file pre-trial motions regarding a purported voice stress exam or polygraph, an alleged prior bad act,[35] and a

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[35] While the habeas petition refers to a bad act (singular), Petitioner's brief before the state appellate court referred to bad acts (plural). (Compare Amended Pet. for Writ of Habeas Corpus (Docket Entry No. 53 at 21) with Addendum No. 18, Br. of Appellant, at 57).

pistol, applying Strickland, the Tennessee Court of Criminal Appeals determined that although it agreed that an objection to the admissibility of the pistol should have been made, Petitioner was not denied effective assistance of counsel because (1) trial counsel did an effective job of challenging the pistol's materiality; and (2) the record did not demonstrate that the trial would probably have been different had the pistol been excluded. 1996 WL 234075, at *9.

With regard to testimony about a polygraph test Petitioner allegedly took, the Tennessee Court of Criminal Appeals stated:

> Henley also fails to show how his trial counsel was deficient in failing to keep out Flatt's offhand reference to a period of time when he and Henley were waiting in a room "for the polygraph test." This reference could not have been anticipated from the question asked Flatt, and an objection arguably would simply have drawn more attention to it. Similarly, Chief Deputy Clifton Long's reference to a polygraph test was offhand and could not have been anticipated from the question asked. No witness testified that the tests had actually been administered, or as to the results of any polygraph tests. Counsel was not deficient in this regard.

Id.

The Court is persuaded that the decision of the Tennessee Court of Criminal Appeals was neither contrary to, nor an unreasonable application of, Strickland. Accordingly, Respondent is entitled to summary judgment on the polygraph and pistol allegations of Petitioner's ineffectiveness of counsel claim.

However, the Court notes that the decision of the Tennessee Court of Criminal Appeals mentioned nothing about a prior bad act. See id. This is not surprising given that Petitioner never provided particulars about this portion of his claim to the state courts. (See Addendum No. 18, Br. of Appellant, at 57). As such, the prior bad acts portion of Petitioner's ineffective assistance of counsel claim was not fairly presented to the state courts. Having not fairly presented this portion of his ineffectiveness claim to the state courts, Petitioner procedurally defaulted it and this Court cannot review it. Accordingly, Respondent is entitled to summary judgment on this portion of Petitioner's ineffective assistance of counsel claim.

Failure to hire an investigator or secure co-counsel (¶ 73). Finally, as for trial counsel's alleged failure for not hiring co-counsel or an investigator, the Tennessee Court of Criminal Appeals did not find these acts to constitute ineffective assistance because Petitioner failed to show any prejudice stemming directly from trial counsel's decision to try the case solo and to not hire an investigator. 1996 WL 234075, at *9.

Under Strickland, Petitioner must show that he was prejudiced by counsel's performance such that he was deprived of a fair trial. 466 U.S. at 687.

Because the Court is persuaded that the decision of the Tennessee Supreme Court was neither contrary to, nor an unreasonable application of, Strickland, Respondent is entitled to summary judgment on this portion of Petitioner's ineffective assistance of counsel claim.

(3) *Guilt and sentencing phase errors.* Petitioner alleges that his trial counsel made numerous errors during the guilt and sentencing phases of trial

(Docket Entry No. 53 ¶¶ 74–79). The Court will address only those allegations that have not already been dismissed as conclusory, *i.e.*, the Court will not review Petitioner's allegations in ¶¶ 78–79.

The alleged deficiencies by trial counsel include failure to (i) make an opening statement and/or explain any defense theory (Id. ¶ 74), (ii) notice or complain about mind-dulling drugs being administered to Petitioner (Id. ¶ 75), (iii) request a limiting instruction about a pistol introduced at trial (Id. ¶ 76), and (iv) object to an alleged voice stress examination taken by Petitioner or request an appropriate limiting instruction (Id. ¶ 77). The Court will address each allegation in turn.

Failure to make an opening statement and/or explain any defense theory. Regarding Petitioner's allegation in ¶ 74 of the amended petition, the Tennessee Court of Criminal Appeals stated:

> [C]ounsel's choice not to make an opening statement was not shown to be ineffective. The State introduced expert evidence at the post-conviction hearing that experienced criminal defense attorneys occasionally choose not to make an opening statement for strategic reasons. Of course, the petitioner introduced expert testimony contending that an opening statement is crucial to the defense. Since it is the petitioner's burden of proving the ineffectiveness of his counsel, and since Henley has shown no prejudice attaching particularly to Mr. Reneau's failure to make an opening statement, we cannot find that, in this regard, the evidence preponderates against the lower court's decision that Henley received competent counsel at the trial.

1996 WL 234075, at *8.

Given Strickland's requirement that a criminal defendant carries the burden of proving ineffective assistance of counsel, the Court is persuaded that the decision of the state courts was neither contrary to, nor an unreasonable application of, Strickland. Accordingly, Respondent is entitled to summary judgment on this portion of Petitioner's ineffective assistance of counsel claim.

Failure to notice or complain about mind-dulling medications being administered to Petitioner. Regarding the allegation in ¶ 75 of Petitioner's amended petition, the Tennessee Court of Criminal Appeals noted that the record did not support a finding of deficiency because (1) Petitioner repeatedly denied using drugs; (2) the sheriff in charge of the jail where Petitioner was imprisoned during trial testified that he had not noticed any change in Petitioner's behavior while Petitioner was medicated; (3) Petitioner never disclosed to his trial counsel that he was taking medication during trial; and (4) there was reason to believe that Petitioner might have lied about being medicated if his counsel simply asked him about it. Id. at *9–*10. Furthermore, citing state law, the court noted that Petitioner had to bear some responsibility for his own failure to inform his counsel about the medications he was taking during trial. Id. at 10*. Finally, the court concluded that even if his counsel was deficient in this regard, Petitioner failed to establish any prejudice under Strickland because it was possible that if Petitioner was medicated during trial, the jury might have found him equally unappealing. Id.

The Court is persuaded that the decision of the state courts was neither contrary to, nor an unreasonable application of, Strickland. Accordingly, Respondent is entitled to summary judgment on this

portion of Petitioner's ineffective assistance of counsel claim.

Failure to request a limiting instruction about a pistol introduced at trial. As for the alleged failure to request a limiting instruction for the pistol alleged in ¶ 76 of the amended petition, while the Tennessee Court of Criminal Appeals found trial counsel deficient for failing to keep the pistol out of evidence, it nonetheless found no prejudice to Petitioner because trial counsel effectively challenged the materiality of the pistol and the record did not demonstrate that the result of the trial likely would have been different had the pistol been excluded. 1996 WL 234075, at *9.

To demonstrate prejudice under Strickland, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694.

Because the decision of the state courts was neither contrary to, nor an unreasonable application of, Strickland, Respondent is entitled to summary judgment on this portion of the ineffective assistance of counsel claim.

Failure to object to an alleged voice stress examination taken by Petitioner or request an appropriate limiting instruction. Finally, regarding the failure to object to or to request a limiting instruction for the voice stress examination or polygraph as alleged in ¶ 77 of the amended habeas petition, the Tennessee Court of Criminal Appeals, applying Strickland, found no deficiency given the unanticipated and limited nature of the references to the examination and the fact that an objection may have only drawn more attention to the comments. 1996 WL 234075, at *9.

The Court is persuaded that the decision of the state courts was neither contrary to, nor an unreasonable application of, Strickland. Accordingly, Respondent is entitled to summary judgment on this portion of Petitioner's ineffective assistance of counsel claim.

(3) Sua sponte determination of an ineffective assistance of counsel allegation. Respondent moves for summary judgment against Petitioner's allegation of ineffective assistance of council on direct appeal as alleged in ¶ 81 of his amended petition due to procedural default for Petitioner's failure to include this allegation on his Rule 11 application for discretionary review of the denial of his post-conviction appeal. The Court notes that the proper dispositive ground for this claim is that the decision of the state courts on this allegation was neither contrary to, nor an unreasonable application of, clearly established federal law as determined by United States Supreme Court precedent.

A court may *sua sponte* grant summary judgment on dispositive grounds not raised by either party where the record discloses no issue of material fact and the prevailing party is entitled to judgment as a matter of law. Routman v. Automatic Data Processing, Inc., 873 F.2d 970, 971 (6th Cir. 1989).

The record shows that Petitioner first raised his allegation in ¶ 81 in his post-conviction appellate brief, not in his amended post-conviction petition before the state trial court, which was his earliest opportunity to raise this claim. (Compare Addendum No. 13, Amended Pet. for Post Conviction Relief with Addendum No. 18, Br. of Appellant, at 64).

Pursuant to Tennessee Code § 40-30-112, Petitioner waived this claim by failing to present it at the earlier state trial court, post-conviction proceeding. But

Respondent did not raise a waiver defense on post-conviction appeal, so Respondent waived this defense. Instead, Respondent argued that because all of Petitioner's direct appellate claims lacked merit, Petitioner's trial counsel was not ineffective at that stage of Petitioner's case. (Addendum No. 19, Br. of the State of Tennessee, at 45).

On post-conviction appeal, the Tennessee Court of Criminal Appeals agreed with Respondent's contention, concluding:

> As to Henley's contention that Mr. Reneau was also ineffective on the direct appeal of this matter, we find this issue without merit. We have addressed all of the issues which Henley claims should have been raised in the direct appeal, but weren't, and found that they do not afford him any grounds for relief. The petitioner therefore suffered no prejudice from Mr. Reneau's decision not to include them in the appeal. Accordingly, Henley's claim of ineffective assistance of counsel on appeal fails.

1996 WL 234075, at *10.

Here, Petitioner does not challenge the factual findings of the state courts as clearly erroneous and present compelling evidence of such error. Nor does he argue that the state courts improperly applied United States Supreme Court precedent to this allegation. He merely improperly attempts to re-litigate this portion of his ineffective assistance of counsel claim in his response.

Because the decision of the Tennessee Court of Criminal Appeals was neither contrary to, nor an unreasonable application of, Strickland, Respondent is entitled to summary judgment on this portion of Petitioner's ineffective assistance of counsel claim.

F. Part Six - Counsel For Petitioner Failed to Present Mitigating Evidence at the Sentencing Hearing, Thus Denying Petitioner the Effective Assistance of Counsel. (Docket Entry No. 53 ¶¶ 82–96)

In ¶¶ 82–96 of the amended habeas petition, Petitioner singles out alleged errors of his trial counsel during the sentencing hearing for a separate ineffectiveness of counsel claim. Petitioner alleges these errors violate his rights under the Sixth, Eighth, and Fourteenth Amendments.

Respondent's Answer and Motion for Summary Judgment follows the format Petitioner established. However, in responding to Respondent's summary judgment motion, Petitioner enmeshes allegations from Part Six of his amended habeas petition with allegations from Part Five, i.e. his other ineffective assistance of counsel claim with regard to the guilt and sentencing phases of his case, requiring the Court to ferret out the portions related to Part Six.

Respondent contends that many of Petitioner's allegations of trial counsel's failure to present mitigating evidence at the sentencing phase under Part Six are conclusory, in whole or in part, and that the decision of the Tennessee Supreme Court on this claim was neither contrary to, nor an unreasonable application of, United States Supreme Court precedent and that the decision was based on a reasonable determination of the facts in the record.

As with his other ineffective assistance claim, Petitioner merely attempts to re-litigate this claim rather than address Respondent's summary judgment arguments. Accordingly, Petitioner waives this claim.

Nonetheless, the Court must examine Respondent's arguments to determine if the uncontroverted facts

entitle Respondent to summary judgment as a matter of law. Because Petitioner does not challenge the state court findings of fact, the Court must give them statutory deference on habeas review. The Court will first address whether any of Petitioner's allegations under this claim are conclusory and then will review any non-conclusory allegations that the state courts decided on the merits.

1. Conclusory Allegations

Respondent contends that Petitioner's allegation in ¶ 87 of the amended petition is conclusory because it fails to specify the available documents upon which the allegation is based. Paragraph 87 states:

> 87. Counsel failed to secure records concerning Steve Henley's mental, physical, psychological, educational, and social history.

Because the Court agrees with Respondent's argument, the Court concludes this allegation is conclusory and Respondent is entitled to summary judgment.

Respondent further maintains that (1) the allegations in ¶¶ 84 and 85 are conclusory if applied to people other than Petitioner's mother, children, sisters, and ex-wife as set forth in ¶¶ 93–96; and (2) the allegations in ¶¶ 86 and 88–92 are conclusory if applied to any evidence beyond the statements set forth in the allegations in ¶¶ 93–96. The relevant paragraphs state:

> 84. Counsel failed to investigate Steve Henley's background to determine whether there were family members, friends, employers or educators who could testify on Steve Henley's behalf at the sentencing phase of trial.

85. Counsel failed to interview Steve Henley's mother, father, sisters, children, or ex-wives, most of whom were present at trial and available to testify in support of a life sentence. Steve Henley's mother was not even informed by counsel about the two parts of a capital trial, and counsel did not contact her prior to trial.

86. Counsel failed to investigate and present mental state mitigating factors, including evidence of extreme mental or emotional disturbance.

88. Counsel failed to investigate and present as mitigating evidence the trauma Steve Henley endured upon the death of his grandfather.

89. Counsel failed to investigate and present mitigating evidence of Petitioner's loss of the family farm, its effect on his self-esteem, and resulting depression which he suffered.

90. Counsel failed to investigate and present evidence that petitioner was self-medicating during the summer of 1985.

91. Counsel failed to investigate and present evidence that because of his family history, the petitioner was at risk for depression and alcohol abuse.

92. Counsel failed to investigate and present evidence that petitioner was not cold-hearted, but a person who has deep feelings and emotions for other people.

93. Counsel failed to discuss with Steve Henley's mother her possible testimony on Steve Henley's behalf at the sentencing

phase of trial, which thereby resulted in her stating in front of the jury that she had nothing to say on his behalf because she did not understand what was going on and what was expected of her. Had she been properly informed about what counsel wanted, she would have informed the jury:

a. That she loved him;

b. It was out of his nature to hurt others;

c. Steve lived with his grandparents on the family farm;

d. Steve's father farmed the land, and at times, he and Steve's mother were separated;

e. Steve thus spent a good part of his childhood living with his grandparents and fishing with his grandfather;

f. The family attended church at Willowgrove Church;

g. Steve had a close relationship with his brothers and sisters;

h. Steve dropped out of high school as a sophomore and was married at age eighteen;

i. Steve had two children by his first marriage; and

j. Steve's grandfather died in 1976, after which Steve used the family farm as collateral for loans to expand the farming operation.

94. Counsel failed to interview Greg Henley and Leanne Henley, Steve Henley's son and daughter, who would have testified about the following mitigating factors:

a. They have a close relationship with their father;

b. Greg and his father worked together on the farm;

c. Greg visited his father on weekends after his parents separated; and

d. Steve Henley was a loving man who loved his family and did not deserve to be put to death.

95. Counsel failed to interview and present the mitigating testimony of Stephanie Robinson and Patricia Woodard, Steve Henley's sisters, who were available to testify in mitigation, and who would have informed the jury:

a. Steve Henley was close to his brother and his sisters;

b. Steve Henley loved his children;

c. The family farm was extremely important to Steve Henley and the family's livelihood;

d. Steve Henley was degraded and devastated by the loss of the family farm;

e. The farm equipment and tools had to be liquidated in order to pay off farming debts;

f. Steve Henley was not violent by nature and was not violent toward his children; and

g. Taking Steve Henley's life would be devastating to his children.

96. Counsel failed to interview and present the mitigating testimony of Cynthia Renee Brown, Steve Henley's ex-wife, who would have informed the jury of the following mitigating factors:

a. She had a son before marrying Steve Henley, and Steve treated her son as if he were his own, and wanted to legally adopt the boy;

b. Steve continued to visit her son after their divorce and even provided her with assistance;

c. She was shocked at the news of Steve Henley's arrest, as she never knew him to be a violent person; and

d. She was aware that Steve had serious financial problems in 1984 and 1985.

Because the Court agrees with Respondent's argument, the Court concludes that (1) the allegations in ¶¶ 84 and 85 are conclusory if extended beyond Petitioner's mother, children, sisters, and ex-wife, and (2) the allegations in ¶¶ 86 and 88–92 are conclusory if applied to any evidence beyond the statements set forth in the allegations in ¶¶ 93–96.

2. Allegations decided on the merits by the state courts (Docket Entry No. 53 ¶¶ 82–83, 84–86, 88–96 subject to the limitations specified in Part V(F)(1) supra.)

Respondent maintains that Petitioner's ineffectiveness claim that trial counsel failed to prepare and call additional witnesses, which the Tennessee Court of Criminal Appeals found meritorious on post-conviction appeal but the Tennessee Supreme Court reversed, was properly determined by the Tennessee Supreme Court. Respondent submits that the decision of the Tennessee Supreme Court was neither contrary to, nor an unreasonable application of, clearly established federal law as determined by the United States Supreme Court and that the decision was based on a reasonable determination of the facts in light of

the evidence contained in the record at trial and on post-conviction.

Because Petitioner does not challenge the factual findings of the state courts, the Court gives these findings deference on habeas review.

Under the prejudice prong of Strickland, if a challenge is to the penalty phase, "the question is whether there is a reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." 466 U.S. at 695.

Applying this principle from Strickland, the Tennessee Supreme Court made the following detailed analysis of Petitioner's claim:

> Though the trial court did not use the term, it is evident from its finding that the trial court concluded that the petitioner had failed to establish prejudice resulting from counsel's alleged failure to prepare and call witnesses. In denying post conviction relief, the trial judge observed that the sentencing jury "had basically everything that these witnesses the last two days have talked about in that record before them."
>
> In reversing the decision of the trial court, the Court of Criminal Appeals stated, "[w]e do not think it is assuming too much to conclude that a jury is going to be prejudiced against a defendant upon that person's own mother refusing to testify on his or her behalf." As evidence of prejudice, the intermediate court quoted from the affidavit of a juror which was submitted as part of the petitioner's offer of proof at the post-conviction hearing in which the juror said, "If a man's own mother won't

testify on his behalf then we know what we've got to do." In addition, the intermediate court stated that, "[e]ven without this offer of proof, we hold that the dearth of favorable testimony offered at the sentencing hearing, when significant amounts of favorable testimony were available establishes a reasonable probability that, but for Mr. Reneau's deficient performance with respect to the sentencing hearing of Henley's trial, the result of the proceeding would have been different."

Initially, we note that the juror's affidavit statement regarding the effect on the sentencing jury of Dorothy Henley's failure to testify should not have been considered by the intermediate appellate court as proof of prejudice. Indeed, the affidavit should not have been considered for any purpose. Rule 606(b) of the Tennessee Rules of Evidence, expressly prohibits a juror from testifying or offering an affidavit "as to any matter or statement occurring during the course of the jury's deliberations *or to the effect of anything upon any juror's mind or emotion as influencing that juror to assent to or dissent from the verdict....*" (Emphasis added.) In this case, the juror's affidavit related to the precise subject matter about which a juror is strictly forbidden from testifying by Rule 606(b)—the effect of the mother's failure to testify on the jury verdict. The affidavit violates the express terms of Rule 606(b) and should not have been considered by the intermediate court as evidence of prejudice.

Moreover, Henley's mother did not refuse to testify in the presence of the jury. Instead, she

asked to first speak with trial counsel. Although the record reflects that she thereafter did not testify, at no time did she openly refuse to testify on Henley's behalf in the presence of the jury as the Court of Criminal Appeals decision indicates. In addition, the fact that the jury was not provided with an explanation as to why Dorothy Henley did not testify does not justify a finding of prejudice. The jury was instructed to base its sentencing decision on the evidence presented at trial, not upon speculation about why a particular witness did not testify. Jurors are presumed to follow the instructions given them in arriving at a verdict. Therefore, it is not appropriate to "assume" the defense was prejudiced because Henley's mother was not called as a witness in his behalf at the sentencing hearing. The fact that Dorothy Henley asked to speak with counsel when called as a witness and thereafter did not testify does not constitute a reasonable probability sufficient to undermine confidence in the outcome of the proceeding.

Finally, the record does not support the Court of Criminal Appeals' statement that prejudice was established because there was a "dearth of favorable testimony offered at the sentencing hearing, when significant amounts of favorable testimony were available." As was previously stated, when assessing the existence of prejudice in the face of an alleged deficiency involving counsel's failure to present mitigating evidence in the penalty phase of a capital trial, we consider whether substantially similar mitigating evidence was presented to

the jury in either the guilt or penalty phase of the proceedings; the nature and extent of the mitigating evidence that was available but not presented; and whether there was such strong evidence of aggravating factors that the mitigating evidence would not have affected the jury's determination.

In this case, the record fully supports the trial court's statement that, through the testimony of Bertha Henley and the petitioner, the original sentencing jury had before it basically the same favorable mitigation evidence that was offered by the many witnesses at the evidentiary hearing on the post conviction petition. As previously summarized herein, the jury heard extensive testimony about Henley's relationship with his grandparents, including his own testimony that he loved them more than anyone else in the world. It is difficult to imagine a more favorable and detailed description of the petitioner's character than that given by Bertha Henley. It is clear from the proof at trial and the evidentiary hearing in this case that the petitioner had a closer relationship with his grandmother, Bertha Henley, than with any other living family member. Indeed, the petitioner's own mother acknowledged that she could have offered no further information about Henley and his life than that given by Bertha Henley at the sentencing hearing.

Dorothy Henley admitted that in the years preceding the murders she had resided in Davidson County and had little contact with her son. On cross-examination, Dorothy Henley also admitted that she visited her son

only a few times in jail before his trial. Overall, Dorothy Henley used very general terms to describe her relationship with her son. Similarly, Henley's older sister gave only general information about the petitioner, and conceded that she had little contact with her brother during the five years preceding the homicides.

While Henley's younger sister and second wife had closer associations with him near the time of the murders, both also had personal knowledge about his use of drugs, specifically marijuana, which was brought out during cross-examination at the evidentiary hearing. Had these two witnesses testified at the sentencing hearing, that same information, no doubt, would have been brought to light. In view of Henley's testimony throughout the trial that he had never abused drugs, the testimony of two family members to the contrary would have been extremely detrimental to the defense.

The only other testimony offered at the evidentiary hearing was that of Henley's children who claimed they would have testified had trial counsel contacted their mother with whom they were residing. However, the children, eleven and thirteen years old at the time of the trial, admittedly were not informed about the trial until its conclusion.

Therefore, the witnesses which were available but not called as witnesses at the original trial, would have offered general, vague testimony about the petitioner's character, and the evidence regarding the petitioner's use of drugs and alcohol was

unfavorable. Moreover, none of these witnesses had a particularly close relationship with the petitioner near the time of the killings. In contrast, the mitigating proof actually presented was detailed, poignant, and favorable and was provided by the petitioner and his grandmother, with whom he had a close relationship. It is significant that the State did not cross examine either the petitioner or his grandmother at the sentencing hearing....

[I]n this case, the proof does not preponderate against the trial court's finding that the petitioner suffered no prejudice even assuming trial counsel failed to completely fulfill that duty. Nothing was adduced at the post conviction hearing which could possibly have added anything favorable to the mitigation proof that was offered at the original trial by the petitioner and his grandmother. Though the petitioner offered a large number of witnesses who claimed they would have testified on his behalf at the sentencing hearing but for counsel's incompetence, the quality of their testimony was weakened either by their limited relationship with Henley at the time of the murders or by their personal knowledge of his drug use at the time of the murders. As the trial judge implicitly found, the testimony offered at the post conviction hearing was, at most, cumulative. Appellate courts must consider the quality of the proposed testimony rather than the quantity of witnesses when determining whether prejudice has been established. Finally, proof of the aggravating circumstances in this case ... was strong. The

> victims were forced at gunpoint from the road to their home. The wife watched as her husband was shot. She was then shot several times, but, according to the testimony at trial, she remained alive and conscious for a time after the fire had begun, and actually died of smoke inhalation. In our view, the petitioner has not established the existence of a "reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death."

960 S.W.2d at 580–82 (citations omitted).

The Court is persuaded that the decision of the Tennessee Supreme Court was neither contrary to, nor an unreasonable application of, Strickland. Accordingly, Respondent is entitled to summary judgment on this claim.[36]

G. Part Seven - Petitioner Was Administered Mind-Dulling Drugs During His Pre-Trial Incarceration and During Trial in Violation of

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[36] Because the Court concludes that this claim would be conclusory if extended beyond Petitioner's relatives and the evidence their testimony would have contributed to establishing mitigating factors at sentencing, the Court need not address the additional allegation Petitioner raised in the state courts that his counsel was deficient for failing to present mitigating expert evidence on Petitioner's mental health at the time of the killings. Had Petitioner properly raised this allegation, it would have failed because the Tennessee Supreme Court reasonably applied Strickland to conclude that trial counsel was not ineffective in this regard because such evidence would have been inconsistent with Petitioner's claims during trial that he was not intoxicated on the day of the murders, never abused drugs, and his farm failed due to unpredictable weather, not his mental health. Henley v. State, 960 S.W.2d 572, 583 (Tenn. 1997).

His Constitutional Rights. (Docket Entry No. 53 ¶¶ 97–104)

In ¶¶ 97–104 of the amended habeas petition, Petitioner alleges that the State administered mind-dulling drugs to Petitioner during his pre-trial incarceration and during trial, without his informed consent, without medical necessity, and without his trial counsel being informed, violating his Sixth, Eighth, and Fourteenth Amendment rights.

While denying that Petitioner was medicated without justification or without consent, Respondent argues in his Motion for Summary Judgment that the central issue is not consent or medical justification but whether Petitioner asked the State to terminate the medications that Petitioner requested from the State. Respondent maintains that the State is not required to establish the need for, and medical appropriateness of, a drug administered to a defendant at the defendant's request unless the defendant requests termination of its use, which Respondent asserts Petitioner did not do. Accordingly, Respondent contends that the state courts properly applied United States Supreme Court precedent to the facts to determine that Petitioner's constitutional rights had not been violated.

In response to Respondent's Motion for Summary Judgment, Petitioner counters that the Tennessee Court of Criminal Appeals misapplied federal law because the State is obligated to establish the need for, and the medical appropriateness of, a drug when mind-dulling or psychotropic drugs are administered to a criminal defendant during trial. Petitioner does not deny that he requested medications from the State for a cough and for nervousness, anxiety, and sleeplessness and does not assert that he ever requested termination of these medications before or during trial. Nor does

Petitioner contest the factual findings of the state court.

In Riggins v. Nevada, the United States Supreme Court declared that forced administration of an anti-psychotic to a criminal defendant after the defendant moves to terminate its use compels the State to establish the need for and the medical appropriateness of the drug. 504 U.S. 127, 135 (1992). Relying on this authority, the Tennessee Court of Criminal Appeals distinguished Petitioner's case by noting that Petitioner requested the anti-anxiety and cough medications that he took before and during trial. 1996 WL 234075, at *4. The trial record also contains no motion by Petitioner to discontinue use of these medications.

The Court is persuaded that the decision of the Tennessee Court of Criminal Appeals was neither contrary to, nor an unreasonable application of, *Riggins*. Thus, Respondent is entitled to summary judgment on this claim.

H. Part Eight - The "Reasonable Doubt" Instructions Given at Trial and at Sentencing Were in Violation of Petitioner's Constitutional Rights. (Docket Entry No. 50 ¶¶ 105–107)

In ¶¶ 105–107 of his amended habeas petition, Petitioner contends that his Sixth, Eighth, and Fourteenth Amendment rights were violated when the trial court provided reasonable doubt instructions that lessened the prosecution's burden of proof at both the guilt and sentencing phases of trial.

Respondent's summary judgment motion counters that the Tennessee Court of Criminal Appeals properly applied United States Supreme Court precedent when it concluded that the jury instructions were constitutionally valid.

In response, Petitioner maintains that the state court's ruling was contrary to, and involved an unreasonable application of, Victor v. Nebraska, 511 U.S. 1 (1994) and Cage v. Louisiana, 498 U.S. 39 (1990), overruled on other grounds by Estelle v. McGuire, 502 U.S. 62 (1991), which provides guidelines on how a court may define reasonable doubt to comport with due process requirements.

The Court grants Respondent summary judgment on this claim *sua sponte*[37] on other grounds, namely that the claim is non-cognizable.

It is undisputed that Petitioner's conviction became final on June 28, 1990,[38] almost five months before the United States Supreme Court announced the new rule of law on reasonable doubt instructions in Cage on November 13, 1990, and four years before the Supreme Court announced its further clarification of the Cage rule in Victor. It is also indisputable that the rule in Cage is not retroactive. Tyler v. Cain, 533 U.S. 656, 664 (2001). Thus, the cases Petitioner relies upon for this claim were determined after Petitioner's conviction became final and the new rule announced in Cage, and further clarified in Victor, is not retroactive. Accordingly, Petitioner's claim is non-cognizable, and

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[37] A court may *sua sponte* grant summary judgment on dispositive grounds not raised by either party where the record discloses no issue of material fact and the prevailing party is entitled to judgment as a matter of law. Routman, 873 F.2d at 971.

[38] For retroactivity purposes, a state conviction becomes final when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for writ of certiorari with the United States Supreme Court has elapsed or a timely filed certiorari petition has been denied. Caspari v. Bohlen, 510 U.S. 383, 390 (1994).

Respondent is entitled to summary judgment on this claim.

However, even if Petitioner's reasonable doubt claim was subject to the rulings in Cage and Victor, it would still fail on the grounds Respondent asserts. "The beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course." Victor v. Nebraska, 511 U.S. at 5. Rather, taken as a whole, instructions on reasonable doubt must correctly convey the concept to the jury. Id.

At the guilt phase of trial, the trial court gave the following reasonable doubt instruction:

> Reasonable doubt is that doubt engendered by an investigation of all the proof in the case, and an inability after such investigation, to let the mind rest easily as to the certainty of guilt.
>
> Reasonable doubt does not mean a captious, possible or imaginary doubt. Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required, and this certainty is required as to every proposition of proof, requisite to constitute the offense.

(Addendum No. 3, vol. 10, Trial Tr., at 1397–98).

At the sentencing phase, the trial court gave the following reasonable doubt instruction: "Reasonable doubt is that doubt engendered by an investigation of all the proof in the case, and an inability after such investigation, to let the mind rest easily as to the certainty of your findings." Id. at 1488.

Petitioner contends that both the guilt and sentencing phase instructions impermissibly equate moral certainty, or letting the mind rest easily as to

certainty, with reasonable doubt contrary to United States Supreme Court precedent in Cage and Victor.

In Victor, the United States Supreme Court held that while the term "moral certainty," standing alone, might be ambiguous and that it did not condone the use of the term, a reviewing court must examine the entire jury instruction to determine whether the context lends meaning to the term. 511 U.S. at 14–17, 21.

The Tennessee Court of Criminal Appeals rejected Petitioner's argument, noting that while the United States Supreme Court criticized the term "moral certainty" in Victor, it did not hold the term to be unconstitutional; rather, the Supreme Court emphasized the need to examine the full jury charge "to determine if the phrase was placed in such a context that a jury would understand that it meant certainty with respect to human affairs." (Addendum No. 30, Order of the Tennessee Court of Criminal Appeals, at 2).

Because the decision of the state court was neither contrary to, nor an unreasonable application of, Victor, Respondent would be entitled to summary judgment on this claim even if the rule in Cage, applied here.

I. **Part Nine - The Prosecution Misled the Jury with Highly Prejudicial Arguments and Misleading Information. (Docket Entry No. 53 ¶¶ 108–19)**

In ¶¶ 108–119 of the amended habeas petition, Petitioner alleges that the prosecution engaged in improper and highly prejudicial behavior by: (1) bolstering and vouching for a witness, and (2) introducing highly inflammatory and irrelevant evidence regarding a pistol and statements about a polygraph in violation of the Sixth, Eighth, and Fourteenth Amendments.

Respondent asserts that (1) the allegation in ¶ 111 is conclusory to the extent it attempts to incorporate any information other than the introduction of the pistol and the polygraph statement; (2) the bolstering and vouching portion of Petitioner's prosecutorial misconduct claim was properly determined by the state courts; and (3) the inflammatory and irrelevant evidence allegations of the prosecutorial misconduct claim were waived or procedurally defaulted.

The Court will address Respondent's arguments in turn.

1. Conclusory allegation

Petitioner does not challenge Respondent's characterization of the allegation in ¶ 111 as conclusory to the extent it attempts to incorporate any information other than the introduction of the pistol and the polygraph statement. Therefore, he waives this argument. Nonetheless, the Court must examine Respondent's argument to determine if the uncontroverted facts entitle Respondent to summary judgment as a matter of law.

The allegation in ¶ 111 of the amended habeas petition states: "The prosecution also improperly presented misleading, inflammatory and irrelevant information to the jury which violated Steve Henley's right to a fair trial and to due process of law under the Eighth and Fourteenth Amendments." This allegation immediately follows the allegations in ¶¶ 109 and 110 concerning improper vouching and bolstering, and the allegations in ¶¶ 112–119 that follow it address only misconduct involving the pistol and the polygraph statements.

Respondent's argument that this allegation is conclusory to the extent it attempts to incorporate any information other than the introduction of the pistol

and the polygraph statement is persuasive given the context in which it is placed within the amended habeas petition. Accordingly, the allegation in ¶ 111 is limited in scope to the pistol and the polygraph statement.

2. The bolstering and vouching allegations

In his allegations in ¶¶ 109 and 110, Petitioner alleges that the prosecution engaged in improper and highly prejudicial behavior by bolstering and vouching for Flatt, a key witness for the prosecution. Specifically, Petitioner challenges two statements the prosecution made during its closing rebuttal argument: (1) "I never enter into any kind of plea agreement without the full..." (cut off by the objection of Petitioner's trial counsel); and (2) "I thought Flatt made one of the best witnesses I've ever seen." Petitioner's counsel objected to both statements during trial. (Addendum No. 3, vol. 10, Trial Tr., at 1382, 1386). And on direct appeal, Petitioner raised allegations that these statements constituted prosecutorial misconduct.

Respondent concedes that both statements were made but argues that the Tennessee Supreme Court properly determined that Petitioner suffered no prejudice from these remarks because: (1) they were made in response to a strong attack by the defense on the evidence; (2) they were limited in nature; and (3) the prosecutor abandoned one line of argument after the defense objected.

Because Petitioner does not rebut Respondent's summary judgment argument, Petitioner waives this argument. Nonetheless, the Court must examine Respondent's argument to determine if the uncontroverted facts entitle Respondent to summary judgment as a matter of law.

While it is improper for a prosecutor to vouch for or bolster a witness's credibility, it is likewise improper for defense counsel to make unfounded and inflammatory attacks. See United States v. Young, 470 U.S. 1, 9 (1985). Inappropriate prosecutorial remarks, alone, do not provide justification to allow a reviewing court to reverse a criminal conviction obtained in an otherwise fair proceeding. Id. at 11. Instead,

> the remarks must be examined within the context of the trial to determine whether the prosecutor's behavior amounted to prejudicial error. In other words, the Court must consider the probable effect the prosecutor's response would have on the jury's ability to judge the evidence fairly. In this context, defense counsel's conduct, as well as the nature of the prosecutor's response, is relevant.

Id. at 12.

Regarding the first statement challenged here by Petitioner, on direct appeal, the Tennessee Supreme Court found no prejudice to Petitioner because:

> The transcript clearly shows [the prosecutor] was responding to the defense counsel's attack on the credibility of Terry Flatt to the effect that his testimony was the product of the plea bargain. It appears that State's counsel may have been about to enter upon extraneous matters, not in evidence, concerning the plea bargain process. He was interrupted by the objection of defense counsel and he abandoned this line of argument. There could have been no prejudice to the defendant.

774 S.W.2d at 911.

The Tennessee Supreme Court found the other challenged statement to be "innocuous" and "far short

of constituting prejudice to the defendant" when taken in context, noting that it was made in response to defense counsel's strong attack on state witness Terry Flatt suggesting that Flatt had sold his testimony to the State. Id.

In reaching the merits of the bolstering and vouching portion of Petitioner's prosecutorial misconduct claim, the Tennessee Supreme Court relied solely upon non-federal sources of law despite Petitioner's citation to relevant federal case law in his brief to the state court. See id.; Addendum No. 4, Appellant's Br., at 51–54. Nonetheless, deferential review of a state court's decision pursuant to the AEDPA applies here where the state court adjudicated on the merits even though the state court did not mention the alleged federal constitutional violation or relevant United States Supreme Court precedent. Aparicio v. Artuz, 269 F.3d 78, 94 (2d Cir. 2001); Bell v. Jarvis, 236 F.3d at 160.

Because the state court's factual findings are not contested as erroneous by Petitioner, the Court must defer to them as correct. Thus, the Court need only review applicable United States Supreme Court precedent to determine whether the state court decision contravenes or unreasonably applies that law. Bell v. Jarvis, 236 F.3d at 163; § 2254(d)(1).

Reviewing the state court's decision in light of the precedent from Young, the Court concludes that the state court's decision was neither contrary to, nor an unreasonable application of, United States Supreme Court precedent because the Tennessee Supreme Court considered the prosecutor's remarks in context with those made by defense counsel to determine that the prosecutor's remarks were not prejudicial to Petitioner. Accordingly, Respondent is entitled to

summary judgment on this portion of Petitioner's prosecutorial misconduct claim.

3. The inflammatory and irrelevant evidence allegations

In ¶¶ 111–119 of the amended habeas petition, Petitioner alleges that the prosecution improperly introduced inflammatory and irrelevant evidence about a pistol without establishing its relevance to the offenses and statements claiming Petitioner had taken a polygraph test.

Respondent alleges that Petitioner waived or procedurally defaulted the pistol evidence allegations and procedurally defaulted the polygraph statements allegations by raising these allegations for the first time on post-conviction instead of on direct appeal.

Petitioner acknowledges that allegations regarding the pistol or the polygraph were not raised on direct appeal. (Petitioner's Resp. to Respondent's Statement of Material Facts In Support of Mot. for Summ. J., Docket Entry No. 94 at 9–10). The Court will address each allegation in turn.

a. The pistol evidence allegations

While Petitioner does not contest the factual findings of the Tennessee Court of Criminal Appeals or its waiver ruling on the pistol evidence allegation as erroneous, he denies procedurally defaulting this portion of his prosecutorial misconduct claim, noting that the Tennessee Court of Criminal Appeals reached the merits of the pistol evidence. Petitioner makes no showing to overcome procedural default.

When a state court unambiguously holds that a federal habeas claim is procedurally defaulted on an adequate and independent state law ground, *i.e.*, by a state procedural rule, the

> state court need not fear reaching the merits of a federal claim in an alternative holding. By its very definition, the adequate and independent state ground doctrine requires the federal court to honor a state holding that is a sufficient basis for the state court's judgment, even when the state court also relies on federal law.

Harris v. Reed, 489 U.S. at 264 n.10.

The Tennessee Court of Criminal Appeals dismissed Petitioner's pistol evidence allegation by stating: "This issue was not raised on direct appeal or in the post-conviction petition, and is therefore waived. Even if it were not waived, however, this issue is without merit." 1996 WL 234075, at *3.

That the Tennessee Court of Criminal Appeals based its dismissal of Petitioner's pistol evidence allegation on Tennessee Rule of Appellate Procedure 36 is clear from its invocation of this rule to dismiss the immediately preceding issue on the same grounds. Id.[39] Because the Tennessee Court of Criminal Appeals denied Petitioner's pistol evidence allegation on an adequate and independent state procedural rule, Petitioner has procedurally defaulted this portion of his prosecutorial misconduct claim and it is barred from federal habeas review, absent a showing of cause or prejudice, or a fundamental miscarriage of justice. Because Petitioner makes no such showing,

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[39] On the immediately preceding claim, the Tennessee Court of Criminal Appeals stated: "We first note that this issue was not raised in the trial, the direct appeal of this case, or in the post-conviction petition. Accordingly, it is waived. T.R.A.P. 36." 1996 WL 234075, at *3.

Respondent is entitled to summary judgment on the pistol evidence allegation.[40]

b. The polygraph statements evidence allegation

Respondent alleges that Petitioner procedurally defaulted the polygraph statements evidence allegation by failing to make a fair presentation of this portion of his prosecutorial misconduct claim to the state courts. Specifically, Respondent asserts that Petitioner's Rule 11 application, *i.e.*, Petitioner's appeal of the denial of his post-conviction appeal, did not raise the polygraph statements in a way that alerted the Tennessee Supreme Court that Petitioner was asserting a federal constitutional right because he only cited state law and only asserted a denial of due process and the right to a fair trial.

Petitioner retorts that his reference to his right to a fair trial and due process in his Rule 11 application constituted fair presentation of federal constitutional rights to the state courts.

In the Sixth Circuit, vague, general references to "due process" and a "fair trial" combined with no citation to any federal precedent do not constitute fair presentation of a specific federal constitutional right to a state court. McMeans, 228 F.3d at 682; Franklin v. Rose, 811 F.2d 322, 325–26 (6th Cir. 1987). Habeas

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[40] Although the state court also went on to deny the pistol evidence claim on the merits, it did so clearly as an alternative ruling, so this Court need not review that decision. See Harris v. Reed, 489 U.S. 255, 264 n.10 (1989). In addition, although Respondent also alleges that Petitioner procedurally defaulted the pistol evidence allegation of his procedural misconduct claim by not properly alerting the state courts of the federal nature of this claim, the Court need not reach this argument, having resolved the issue on other grounds.

claims not previously fairly presented to a state court are barred from federal review. McMeans, 228 F.3d at 681.

In his Rule 11 application to the Tennessee Supreme Court, Petitioner's statement of this portion of his prosecutorial misconduct claim alleged that the State's reference to the polygraph statements "VIOLATED HIS RIGHT TO A FAIR TRIAL AND HIS RIGHT TO DUE PROCESS OF LAW." (Addendum No. 25, Appellant's Application for Permission to Appeal, at 14). His argument cited only one legal authority,[41] a state law case concerning the inadmissibility of polygraphs into evidence, and made only the following reference to his rights: "This reference [to the polygraph] deprived Mr. Henley of his right to a fair trial." Id.

Petitioner's polygraph statements evidence were not fairly presented to the Tennessee Supreme Court to preserve his habeas claim because this portion of his prosecutorial misconduct claim cited only state law and brought no specific federal constitutional right to the state court's attention. In the context in which Petitioner raised this claim to the Tennessee Supreme Court, his reference to rights to a fair trial and due process may be construed as applying to rights under Tennessee law or the Tennessee Constitution. Accordingly, Petitioner has procedurally defaulted this portion of his prosecutorial misconduct claim, and Respondent is entitled to summary judgment.

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41 Hembree v. State, 546 S.W.2d 235, 240 (Tenn. Crim. App. 1976).

J. Part Ten - The Jury Erroneously Imposed the Death Penalty Without Finding Any Valid Aggravating Circumstance.[42] (Docket Entry No. 53 ¶¶ 120–132)

In the allegations in ¶¶ 120–132 of the amended habeas petition, Petitioner alleges that the jury imposed the death penalty without finding any valid aggravating circumstance because the jury did not write out the full terms of the aggravating circumstance on its verdict form as required by Tennessee law and the United States Constitution, in violation of the Sixth, Eighth, and Fourteenth Amendments. Instead, it only stated "We the jury found the following statutory aggravating circumstances—atrocious, cruel, torture." (Docket Entry No. 53 ¶ 123). Citing Stringer v. Black, 503 U.S. 222 (1992) in his amended habeas petition, without providing a pinpoint citation, Petitioner further asserts that in a weighing state, such as Tennessee, no capital sentencer may weigh an invalid aggravating factor under the Eighth Amendment and therefore Petitioner is entitled to habeas corpus relief.

Respondent contends that the decision of the state courts, which determined that the jury's finding that the statutory aggravating circumstances, to wit, atrocious, cruel, torture, was sufficient and such finding was neither contrary to, nor an unreasonable application of, clearly established United States

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[42] Petitioner consolidated Parts Ten, Eleven, and Twelve (Docket Entry No. 53 ¶¶ 120–161) from the amended habeas petition into one section in his response brief to Respondent's summary judgment motion thereby complicating the Court's task in evaluating these claims and risking their forfeiture. See United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991).

Supreme Court precedent. Therefore, he is entitled to summary judgment on this issue.

In response, Petitioner does not contend that the decision of the state courts misapplied federal law as determined by the United States Supreme Court, nor does he assert that the factual findings of the state courts were erroneous. Instead, Petitioner improperly attempts to re-litigate this claim and improperly attempts to expand its constitutional grounds to include an alleged depravation of a due process liberty interest due to the mandatory language in Tennessee's aggravating circumstance statute pursuant to Hewitt v. Helms, 459 U.S. 460 (1983), receded from by Sandin v. Conner, 515 U.S. 472 (1995), which held that the use of mandatory language in state prison statutes and regulations creates a due process liberty interest.

Because Petitioner did not raise the due process liberty interest theory before the state courts, he failed to exhaust this portion of his claim and is procedurally barred from raising it before this Court on habeas review.[43]

Moreover, by not responding to Respondent's summary judgment argument, Petitioner waives this claim. Nonetheless, the Court must examine Respondent's argument to determine if the uncontroverted facts entitle Respondent to summary judgment as a matter of law. Because Petitioner does not challenge the state court findings of fact as erroneous, this Court must give them deference on

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[43] Petitioner's contention that the mandatory language of the Tennessee aggravating circumstance statute created a due process liberty interest would fail even if properly raised because in Sandin v. Conner, 515 U.S. 472 (1995), the United States Supreme Court expressly rejected the mandatory language test that it had applied in Hewitt v. Helms, 459 U.S. 460 (1983).

habeas review pursuant to § 2254(e)(1). In making a decision in capital cases, a state court has the following obligations:

> [I]f a state wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates "standardless [sentencing] discretion."

Godfrey v. Georgia, 446 U.S. 420, 428 (1980).

> That [a state] is a weighing State only gives emphasis to the requirement that aggravating factors be defined with some degree of precision.... In a weighing state, infection of the sentencing process with an invalid aggravating factor might require invalidation of the death sentence.... [U]nder such circumstances a state appellate court could reweigh the aggravating and mitigating circumstances or undertake harmless-error analysis....

Stringer, 503 U.S. at 230 (citation omitted; emphasis added).

On direct review of Petitioner's invalid aggravating circumstance claim, the Tennessee Supreme Court applied harmless error analysis and found that the jury was properly instructed on Tennessee's statutory aggravating circumstance: "The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind." 774 S.W.2d at 917; see also Tennessee Code 39-2-203(i)(5). That court then noted that:

On the form provided by the court to enable them to reduce to writing the statutory aggravating circumstances found by them the jury responded, "we the jury found the following statutory aggravating circumstances-atrocious, cruel, torture." The forms contain the signature of each member of the jury in accordance with the instructions delivered to them by the trial judge. [D]efendant's reference to Godfrey v. Georgia (citation omitted) does not support his complaint. Godfrey stands for the principle that a State which authorizes capital punishment has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of the State's responsibility in this regard is to define crimes for which death may be the sentence in a way that obviates standardless sentencing discretion. It is the definitions supplied by the State which must satisfy the constitutional mandate, and not the manner of response of the jury.

. . . .

It seems likely that the procedure employed by the trial court was inadvertent. There was no objection on the part of the defense when the incident occurred and there is nothing in the statute to indicate that separate reports were required. It is evident that the jury fully understood their responsibility and it was their intent to sentence defendant to death on each count of the indictment as it appears in the judgment

> of the court. We find any error to be harmless.

774 S.W.2d at 917.

Petitioner raised his invalid aggravating circumstance issue again on his Motion to Re-Open Post-Conviction Petition, citing State v. Harris, 989 S.W.2d 307 (Tenn. 1999), for the proposition that an incomplete aggravating circumstance implicates constitutional vagueness concerns when a death sentence is imposed, making the circumstance invalid. (Addendum No. 29, Mot. to Re-Open Pet. for Post-Conviction Relief, at 3–4). On Petitioner's appeal of the denial of this motion, the Tennessee Court of Criminal Appeals denied Petitioner's invalid aggravating circumstance claim because: (1) Petitioner's claim asserted no new rule of constitutional law but merely reiterated constitutional principles established in Godfrey; and (2) Petitioner had already raised this claim on direct appeal where the Tennessee Supreme Court had rejected it. (Addendum No. 30, Order of the Tennessee Court of Criminal Appeals, at 4–5).

The Court is persuaded that the decision of the state courts was neither contrary to, nor an unreasonable application of, United States Supreme Court precedent to Petitioner's invalid aggravating circumstance claim. Accordingly, Respondent is entitled to summary judgment on this claim.

K. Part Eleven - The Sentencing Verdict Did Not Comply With Tennessee Law Because it Was Not In a Written Form (Docket Entry No. 53 ¶¶ 133–138)

In ¶¶ 133–138 of the amended habeas petition, Petitioner alleges that the sentencing verdict did not comply with Tennessee law because it was not in a

written form, a violation of due process under the Fourteenth Amendment. Relying solely on Stromberg v. California, 283 U.S. 359 (1931), Petitioner contends that because the jury only returned one verdict form, it is not clear as to which victim the verdict form applied. Respondent counters that the trial judge's request for a separate verdict on each count after the jury completed its deliberations was noted by the Tennessee Supreme Court on direct appeal and clearly established that the verdict applied to each victim. Furthermore, Respondent maintains that the Tennessee Supreme Court properly concluded that the trial court's oversight in not instructing the jury to return two separate verdict forms did not affect the verdict or judgment, or result in prejudice to Petitioner. And Respondent contends that the Tennessee Supreme Court also properly noted that the defense did not object when the incident occurred and nothing in the sentencing statute indicates that separate verdicts were required. Respondent contends that the decision of the state courts was neither contrary to, nor an unreasonable application of, clearly established federal law as determined by the United States Supreme Court.

Petitioner fails to address Respondent's summary judgment arguments and instead improperly attempts to re-litigate this claim. Thus, Petitioner waives this claim. Ordinarily, the Court would examine Respondent's argument to determine if the uncontroverted facts entitle Respondent to summary judgment as a matter of law. However, the Court declines to do so and instead grants Respondent summary judgment *sua sponte* on the grounds that Petitioner has procedurally defaulted this claim by failing to exhaust it before the state courts.

In presenting this claim before this Court, Petitioner relies on only Stromberg in his amended habeas petition and on Stromberg and Hewitt[44] in his response brief to Respondent's Motion for Summary Judgment. The record shows that neither case was cited to the state courts. Moreover, although Petitioner's direct appeal to the Tennessee Supreme Court did raise this issue, it did not allege a federal constitutional violation or cite any case law invoking federal constitutional analysis. And Petitioner's Rule 11 Application did not raise this issue or the theory which Petitioner advocates here. Thus, Petitioner has failed to properly exhaust this claim before the state courts and is procedurally barred from presenting it here. Accordingly, Respondent is entitled to summary judgment on this claim.

L. Part Twelve - The Sentencing Verdict is Invalid Because of the Use of the "Heinous, Atrocious, or Cruel" Language. (Docket Entry No. 53 ¶¶ 139–161)

In ¶¶ 139–161 of the amended habeas petition, Petitioner alleges that the sentencing verdict is invalid because (1) the aggravating circumstance "heinous, atrocious, or cruel" is unconstitutionally vague and overbroad, and (2) insufficient evidence supports the verdict in violation of the Eighth and Fourteenth Amendments.

In his Motion for Summary Judgment, Respondent contends that (1) the decision of the state courts upholding the validity of the aggravating circumstance neither contravened, nor unreasonably applied, established United States Supreme Court precedent

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[44] Petitioner alleges deprivation of a due process liberty interest due to the mandatory language in Tennessee's statute that requires a verdict be reduced to writing.

and was based on a reasonable determination of the facts in light of the evidence before the state courts; and (2) Petitioner procedurally defaulted the sufficiency of the evidence portion of this claim.

In response to Respondent's summary judgment argument, Petitioner asserts that (1) the decision of the state courts upholding Petitioner's death sentence was contrary to, or an unreasonable application of, federal law because the "heinous, atrocious, or cruel" aggravating circumstance was constitutionally vague and overbroad; and (2) regarding the sufficiency of the evidence portion of his claim, he argues that where state statute mandates that state courts review death sentences for constitutional error, there is no adequate and independent ground precluding federal habeas review. The Court will address each of these arguments in turn.

1. **Whether the decision of the state courts was contrary to, or an unreasonable application of, federal law because the aggravating circumstance was unconstitutionally vague and overbroad**

In ¶¶ 139–151 of the amended habeas petition, Petitioner urges that the "heinous, atrocious, or cruel" aggravating circumstance in Petitioner's sentencing instruction was unconstitutionally vague and overbroad. Petitioner asserts that denial of relief by the state courts on this claim was contrary to, and an unreasonable application of (1) Barber v. Tennessee, 513 U.S. 1184 (1995) (Stevens, J., concurring in denial of certiorari), (2) Shell v. Mississippi, 498 U.S. 1 (1990), (3) Stringer v. Black, 503 U.S. 222 (1992), (4) Maynard v. Cartwright, 486 U.S. 356 (1988), (5) Godfrey v. Georgia, 446 U.S. 420 (1980), (6) Richmond v. Lewis, 506 U.S. 40 (1992), (7) Houston v. Dutton, 50 F.3d 381 (6th Cir. 1995), and (8) Coe v. Bell, 161 F.3d 320 (6th

Cir. 1998). Petitioner also cites case law from other federal circuit courts of appeal.

While conceding that, standing alone, the language "heinous, atrocious, or cruel" is unconstitutionally vague and overbroad, Respondent argues that the state courts nonetheless properly determined that these terms are constitutional when placed with other modifying and limiting language that prevents arbitrary sentencing.

As a preliminary matter, the Court notes that Petitioner challenges the decision of the state courts pursuant to § 2254(d)(1), which limits challenges to contrary or unreasonable applications of "clearly established Federal law, as determined by the Supreme Court of the United States." Thus, Petitioner's reliance on Houston, Coe,[45] and case law from other federal appellate courts is misplaced because it is not United States Supreme Court precedent.

Likewise, Petitioner's reliance on Barber, an opinion on the denial of certiorari, is misplaced because a denial of certiorari does not constitute a ruling on the merits. United States v. Carver, 260 U.S. 482, 490 (1923).

"[A] statutory aggravating factor is unconstitutionally vague if it fails to furnish principled guidance for the choice between death and a lesser penalty." Richmond, 506 U.S. at 46. Here, Respondent concedes that, the "heinous, atrocious, or cruel"

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[45] Even if Coe and Houston could be used to review the state court's vagueness analysis, the Tennessee Supreme Court has provided a sound rationale for why these cases are distinguishable. See, e.g., Terry v. State, 46 S.W.3d 147, 160 (2001), cert. denied, ____ U.S. ____, 122 S.Ct. 553 (2001); State v. Middlebrooks, 995 S.W.2d 550, 556 n.7 (Tenn. 1999).

aggravating circumstance, standing alone, is unconstitutionally vague. And the United States Supreme Court has found similar language in an aggravating circumstance, standing alone, or in combination with vague definitions of the terms used in the aggravating circumstance, to be unconstitutionally vague. See, e.g., id.; Shell, 498 U.S. at 1; Maynard, 486 U.S. at 363–64; Godfrey, 446 U.S. at 428.

Nonetheless, a state appellate court may rely upon an adequate narrowing construction of an aggravating circumstance to cure a vague aggravating circumstance. Richmond, 506 U.S. at 47; Arave v. Creech, 507 U.S. 463 (1993); Walton v. Arizona, 497 U.S. 639, 654–55, overruled on other grounds by, Ring v. Arizona, ____ U.S. ____, (2002); Lewis v. Jeffers, 497 U.S. 764 (1990); Proffitt v. Florida, 428 U.S. 242 (1976).

In reviewing Petitioner's vagueness and overbreadth argument on petition to rehear, the Tennessee Supreme Court held that it had addressed a similar argument in other cases and concluded that the aggravating circumstance given to the jury in Petitioner's case was constitutionally sound because the "heinous, atrocious, or cruel" language in the aggravating circumstance did not stand alone, but, instead was modified and limited by the phrase "in that it involved torture or depravity of mind" and was further narrowed by the definitions of those terms. 774 S.W.2d at 918, citing State v. Williams, 690 S.W.2d 517, 529 (Tenn. 1985) and State v. Thompson, 768 S.W.2d 239, 252 (Tenn. 1989). On post-conviction appeal, the Tennessee Court of Criminal Appeals noted that it was bound by the holdings of the Tennessee Supreme Court on this claim. 1996 WL 234075, at *6.

The Court notes additionally that in Shell, the United States Supreme Court found an "especially heinous, atrocious, or cruel" aggravating factor plus

vague definitions of those terms to be unconstitutionally vague. 498 U.S. at 1. Here, the jury instructions went beyond those in Shell to include the limiting phrase "in that it involved torture or depravity of mind." Given that the United States Supreme Court has ruled that narrowing constructions can salvage an otherwise vague aggravating circumstance and that court has also suggested that a narrowing construction similar to that used by Tennessee would be adequate to overcome vagueness, the Court concludes that the decisions of the state courts here were neither contrary to, nor an unreasonable application of, United States Supreme Court precedent. See, e.g., Maynard, 486 U.S. at 365 ("We also do not hold that some kind of torture or serious physical abuse is the only limiting construction of the heinous, atrocious, or cruel aggravating circumstance that would be constitutionally acceptable."). Accordingly, Respondent is entitled to summary judgment on this portion of this claim.

2. Whether there was sufficient evidence to support the "heinous, atrocious, or cruel" circumstance as to either victim

In ¶¶ 152–161 of the amended habeas petition, Petitioner alleges that there was insufficient evidence to support any finding of the "heinous, atrocious, or cruel" aggravating circumstance asto either victim in violation of the Eighth and Fourteenth Amendments. Specifically, Petitioner alleges there was no evidence of torture. (Petitioner's Resp. in Opp'n to Respondent's Mot. for Summ. J., Docket Entry No 92 at 92–93).

Respondent maintains in his summary judgment motion that on direct appeal, Petitioner raised the sufficiency of the evidence only as to guilt, not as to its support of the aggravating circumstance, thereby procedurally defaulting this portion of his claim.

Respondent further maintains that Petitioner fails to plead any facts to overcome this procedural default.

The Court will first determine whether Petitioner procedurally defaulted the sufficiency of the evidence portion of his claim. If so, the Court will determine whether Petitioner has overcome this default.

a. Whether Petitioner procedurally defaulted the sufficiency of the evidence portion of his claim

Petitioner disputes that he failed to challenge the sufficiency of the evidence to support the aggravating circumstances on direct appeal, citing to a single page (p. 32) in his direct appellate brief. (Petitioner's Resp. to Respondent's Statement of Material Facts in Support of Mot. for Summ. J., Docket Entry No. 94 at 11).

Ordinarily, a dispute of material fact precludes a court from granting the moving party summary judgment. However, the Court notes that Respondent is entitled to partial summary judgment here to the extent that the amended habeas petition expands the allegations of sufficiency of the evidence for the aggravating circumstance beyond those Petitioner raised in the state courts.

The record shows that in his direct appellate brief, Petitioner asserted that there was no proof of torture to satisfy the aggravating circumstance. (Addendum No. 4, Appellant's Br., at 32). In his direct appellate brief, Petitioner cited Godfrey v. Georgia, 446 U.S. 420 (1980), which addresses, among other things, why the death penalty was improperly imposed on a defendant because there was no evidence of torture to support the aggravating circumstance. Id. Furthermore, the record shows that Respondent acknowledged that evidence to support the aggravating circumstance was

at issue on direct appeal: "The issue before the Court is whether the evidence is sufficient to support a jury finding of torture." (Addendum No. 5, Br. of the State of Tennessee, at 75).

Nonetheless, Petitioner raises the issue here with different factual premises than he did before the Tennessee Supreme Court. On direct appeal, Petitioner stated:

> T.C.A. § 39-2-203(i)(5) requires evidence that the defendant inflicted torture on the victim before death and while conscious. There is no proof to torture. The co-defendant Flatt testified:
>
> "Q All right. Now tell the ladies and gentlemen of the jury what happened after that?
>
> A Well, he (Henley) went to shooting the man, and then he turned around and the woman, she was over like pretty close to where I was standing, and he shot her a time or two and then he threw the rifle towards me, and she was laying there on the floor moaning and groaning, saying, 'Oh, oh, oh,' and he took out his pistol and he shot her a time or two with his pistol."
>
> . . . .
>
> Q Now, I believe you said that you heard her say something in there, is that right?
>
> A Yes, sir.
>
> Q Can you describe what she said, or . . .
>
> A She was going, 'Oh, oh,' and when he pulled out the pistol and shot a time or two, she ceased to moan and groan, or whatever.
>
> Q Did you hear Mr. Stafford say anything at all?

A No, sir."

As stated in Williams,[46] at 529, "torture" means:

"[18] (sic) 'Torture' means the infliction of severe physical or mental pain upon the victim while he or she remains alive and conscious."

The foregoing facts, under the authority of Godfrey, Pritchett,[47] and Williams, do not establish that the defendant inflicted torture on either of the victims before their death and while they were conscious. In the absence of proof of "torture", [sic] the death penalty cannot be imposed in this case.[48]

(Addendum No. 4, Appellant's Br., at 31–32 (citations omitted)).

While Petitioner did not expressly assert Eighth and Fourteenth Amendment rights before the state courts on direct appeal, he did cite Godfrey, which asserts these rights, in support of his sufficiency of the evidence argument there. Thus, Petitioner raised the same legal theory before the state courts as he does here.

Here, however, in place of the above facts, Petitioner asserts the following facts in the amended habeas petition that he did not present before the state courts:

155. The only evidence concerning the circumstances of his death which are

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46 State v. Williams, 690 S.W.2d 517 (1985).

47 State v. Pritchett, 621 S.W.2d 127 (1981).

48 Petitioner's attributions to the trial record and to Williams are accurate.

> independently shown (excluding Flatt's story) was that Fred Stafford was shot once in the heart and that he died before any exposure to fire. The prosecution presented no other independent evidence concerning the circumstances of Mr. Stafford's death. (Citation omitted).
>
> 157. Further, there are reasonable hypotheses apart from the existence of a heinous, atrocious, or cruel offense which are consistent with the physical facts [of Fred Stafford's death]. Therefore, the death sentence is unconstitutional.
>
> 159. The only evidence concerning the circumstance of her death which is independently shown (excluding Flatt's story) is that her body was burned in a fire.
>
> 160. There is, however, absolutely no proof establishing that she was shot, or that she was even conscious before she suffered burns. Consequently, there was insufficient evidence to support any finding that her death was "heinous, atrocious, or cruel in that it involved torture or depravity of mind."

Because Petitioner did not fairly present his allegations in ¶¶ 155, 157, 159, and 160 before the state courts and these unexhausted allegations no longer can be presented to the state courts pursuant to Tennessee Code § 40-30-202, these allegations are deemed exhausted but procedurally barred from federal habeas review unless Petitioner can establish an excuse to overcome this procedural default.

b. Whether Petitioner overcomes his procedural default

Petitioner maintains that he is not precluded from raising the sufficiency of the evidence portion of this claim because (1) the Tennessee Supreme Court is obligated to review claims of fundamental constitutional error pursuant to Rule 52 of the Tennessee Rules of Appellate Procedure; and (2) Tennessee Code § 39-2-205, which mandates that the Tennessee Supreme Court review, among other things, all sufficiency of the evidence claims related to death penalty sentencing on direct appeal, preserves the portion of his claim he now raises, despite his failure to raise this specific portion of his claim before the state courts.

A procedurally defaulted habeas claim may be reviewed by a habeas court if the petitioner can establish a showing of cause and prejudice or a fundamental miscarriage of justice to overcome the default.

The scope of a state court's mandatory review is, ultimately, a question of state law. Nave v. Delo, 62 F.3d 1024, 1039 (8th Cir. 1995). Federal courts have very limited powers in construing state statutes or rules and may not sit as a super-state legislature imposing their own construction of state law. Eubanks v. Wilkinson, 937 F.2d 1118, 1126 (6th Cir. 1991).

The Court will review each of Petitioner's excuses to overcome procedural default in turn.

(1) *Fundamental error.* Petitioner's fundamental error argument, as expressly stated in his response brief, is premised on non-existing law. The Tennessee Rules of Appellate Procedure contain no Rule 52. Even, assuming Petitioner meant instead to refer to Rule 52 of the Tennessee Rules of Criminal

Procedure,[49] the Court still finds no merit in Petitioner's argument to excuse his procedural default.

Rule 52 of the Tennessee Rules of Criminal Procedure enables a state court to address plain or fundamental error on direct appeal. However, pursuant to Tennessee Code § 40-30-112, such errors are waived on post-conviction if they were not presented in a court proceeding in which they could have been presented. See Tennessee Code § 40-30-112; Rickman v. State, 972 S.W.2d 687, 693 (Tenn. Crim. App. 1997). Similar to the instant case, the post-conviction appellant in *Rickman* contended that his claims could not be waived because they involved fundamental error. Id. at 694 n.9. The Rickman court squarely rejected this argument, noting:

> [O]ur supreme court has observed that states have no constitutional duty to provide post-conviction relief procedures, and, accordingly, the opportunity to collaterally attack constitutional violations during the conviction process is not a fundamental right entitled to heightened due process protection. Moreover, to the extent that the appellant is arguing that capital litigants should be exempt from waiver or statute of limitations provisions of the Post-Conviction Procedure Act, the legislature has declined to provide any such exception and we decline to hold that either the state or

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[49] Rule 52(b) of the Tennessee Rules of Criminal Procedure provides, in pertinent part, "An error which has affected the substantial rights of an accused may be noticed at any time, even though not raised in the motion for a new trial or assigned as error on appeal, in the discretion of the appellate court where necessary to do substantial justice."

> federal constitution mandates any such exception.

Id. (citation omitted).

Here, the full factual basis for the sufficiency of the evidence portion of Petitioner's claim could have been presented to the Tennessee Supreme Court on direct appeal. Because it was not, pursuant to Tennessee Code § 40-30-112, Petitioner waived it. And as it existed at the time of Petitioner's first post-conviction hearing, Tennessee law provided no exceptions to waiver of claims. Because the state law grounds for waiving Petitioner's claim are adequate and independent of federal law, Petitioner's sufficiency of the evidence portion of his claim is barred from federal habeas review. Thus, Petitioner's fundamental error argument fails to establish cause and prejudice to overcome procedural default.

(2) *Mandatory review of death sentence.* Petitioner's alternate argument relies on Tennessee Code § 39-2-205 as well as Beam v. Paskett, 966 F.2d 1563 (9th Cir. 1992), and Ake v. Oklahoma, 470 U.S. 68 (1985). As a preliminary matter, these supporting authorities raise some concerns. To begin with, Ninth Circuit opinions are not binding in the Sixth Circuit. Too, the judgment in Beam was vacated by the United States Supreme Court in Arave v. Beam, 507 U.S. 1027 (1993). Although the logic used in a vacated judgment may be used to try to persuade a court, vacated judgments have no precedential value. O'Connor v. Donaldson, 422 U.S. 563, 577 n.12 (1975). And the United States Supreme Court has never applied its rule regarding independent state grounds from Ake, a direct appeals case, in a federal habeas setting. Coleman, 501 U.S. at 741; Stewart, ____ U.S. at ____, 122 S.Ct. at 2581.

Preliminary concerns aside, the logic applied in Beam is not dispositive here. The Ninth Circuit in Beam determined, in dicta, that Idaho's mandatory death sentence review statute and Idaho case law require the Idaho Supreme Court to review death sentences for constitutional error on specific grounds even where the petitioner raised no claims of such errors. Beam, 966 F.2d at 1568–69. Then, applying Ake to this review scheme, the Ninth Circuit concluded that it is impossible for a petitioner to procedurally default a federal habeas claim on grounds specified in the state mandatory review statute that the petitioner did not raise in the state courts because application of the procedural bar depends on an antecedent application of federal law and thus does not constitute an adequate and independent state ground. Id. at 1569–70.

Tennessee case law does not support the principle that mandatory state statutory review of death sentences constitutes automatic exhaustion of all of a petitioner's constitutional claims. Rather, the Tennessee Supreme Court has interpreted Tennessee Code § 39-2-205 as requiring that court "to consider any alleged error, whether called to the trial court's attention or not." State v. Duncan, 698 S.W.2d 63, 67–68 (Tenn. 1985). Thus, while allowing a petitioner to overcome the default of failing to raise an objection to specified types of constitutional sentencing errors at trial, Tennessee's scheme of mandatory death sentence review does not provide an override to constitutional sentencing errors that the petitioner fails to allege on direct appeal.

Petitioner did not allege the same factual premises for the sufficiency of the evidence portion of this claim before the state courts on direct appeal that he raises here. Accordingly, Petitioner's mandatory review

excuse to overcome his procedurally defaulted sufficiency of the evidence portion of claim No. 12 also fails.

Because Petitioner has procedurally defaulted the allegations in ¶¶ 155, 157, 159, and 160 by not properly exhausting them before the state courts and presents no sufficient excuse to override this default, Respondent is entitled to summary judgment on this portion of his claim. However, Respondent is not entitled to summary judgment on the allegations presented in ¶¶ 152–54, 156, 158, and 161, which are also related to the sufficiency of the evidence for the aggravating circumstance on procedural default grounds because Petitioner has proven that these allegations were raised before the state courts on direct appeal.

Nonetheless, the Court grants Respondent summary judgment sua sponte on these allegations on other grounds, i.e., that the decision of the state courts was neither contrary to, nor an unreasonable application of, United States Supreme Court precedent.

As aforementioned, the record shows that in his direct appellate brief, Petitioner asserted that there was no proof of torture to satisfy the aggravating circumstance. (Petitioner's Resp. to Respondent's Statement of Material Facts in Support of Mot. for Summ. J., Docket Entry No. 94 at 11). However, here, while Petitioner raises the same argument as he did before the state courts, he does not argue that the factual findings of the state court were erroneous or submit proof of such. Thus, on federal habeas review, the Court must accord deference to the findings of the state courts.

On direct appeal, the Tennessee Supreme Court found that the victims had been subjected to mental torture as evidenced by the way they were marched up their driveway at gunpoint to their house by Petitioner with the certainty in their minds from Petitioner's actions that they were to be seriously injured or murdered. 774 S.W.2d at 912. That court further commented, "It cannot be doubted that mental torture can be imposed upon a victim and involves torture or depravity of mind just as some physical act might." Id. at 912–13.

Having found evidence of torture, the conclusion of the Tennessee Supreme Court that the aggravating circumstance was fully supported by the evidence, 774 S.W.2d at 918, was neither contrary to, nor an unreasonable application of, Godfrey. Accordingly, Respondent is entitled to summary judgment sua sponte on the allegations contained in ¶¶ 152–54, 156, 158, and 161.

M. Part Thirteen - The Jury Was Misled By Its Instructions For Finding Mitigating Circumstances. (Docket Entry No. 53 ¶¶ 162-169)

In ¶¶ 162–169 of the amended habeas petition, Petitioner alleges that at sentencing, the jury was misled into believing that mitigating circumstances had to be found unanimously, in violation of the Eighth and Fourteenth Amendments.

Respondent contends that (1) to the extent that Petitioner expands this claim beyond the limited basis he raised in the state courts, he has procedurally defaulted it; (2) Petitioner fails to allege any facts to support a finding of cause and prejudice to excuse his default; and (3) regarding that portion of Petitioner's claim that was not defaulted, the state courts properly determined that there was no constitutional infirmness

in the mitigating circumstances; thus, the decision of the state courts was neither contradictory to, nor an unreasonable application of, United States Supreme Court precedent.

Once again, in his response, Petitioner attempts to re-litigate the issue and fails to address Respondent's summary judgment arguments. Hence, Petitioner waives this claim. Nonetheless, the Court must examine Respondent's arguments to determine if the uncontroverted facts entitle Respondent to summary judgment as a matter of law. Because Petitioner does not challenge the state court findings of fact as erroneous, the Court must give them deference on habeas review.

The record shows that Petitioner first raised the unanimity issue in his amended petition for post-conviction relief. (Addendum No. 13, Amended Pet. for Post Conviction Relief, at 4). Petitioner raised this issue again on appeal from denial of post-conviction relief. (Addendum No. 18, Br. of Appellant, at 76–77, 82–83). In neither pleading did Petitioner's unanimity argument make the allegations found in ¶¶ 163–66 and 168 of his amended habeas petition. Furthermore, Petitioner's post-conviction brief only made reference to the "sufficiently substantial" language in the jury form, alleging it was vague; here, he cites the full language of the jury form in the allegation found in ¶ 167 and drops the vagueness argument. (Compare Addendum No. 18, Br. of Appellant, at 76–77 with Amended Pet. for Writ of Habeas Corpus, Docket Entry No. 53 at 41–42). And Petitioner cites more legal authority here than he did in his post-conviction appellate brief. (Compare Addendum No. 18, Br. of Appellant, at 82–83 with Amended Pet. for Writ of Habeas Corpus, Docket Entry No. 53 at 42). Finally, the allegation found in ¶ 169 charges that the jurors

could have interpreted the verdict form as requiring unanimity while Petitioner's post-conviction appellate brief only charged that the terms "sufficiently substantial" rendered the jury form vague and confusing. (Compare Amended Pet. for Writ of Habeas Corpus, Docket Entry No. 53 at 42 with Addendum No. 18, Br. of Appellant, at 76–77).

To the extent that Petitioner has expanded his allegations of fact and legal citations beyond what he presented to the state courts, he has not fairly presented these allegations or legal theories to the state courts and is procedurally barred from doing so here absent a showing of cause and prejudice or a fundamental miscarriage of justice. Petitioner makes no averments of cause and prejudice or fundamental miscarriage of justice on this claim. Thus, he has procedurally defaulted these extensions of his claim.

The non-defaulted portion of Petitioner's claim asserts that the jury instructions misled the jurors into believing that they must unanimously agree about mitigating circumstances. According to the federal law that Petitioner raised both before the state courts and here, a state's sentencing scheme violates the Eighth Amendment when there is a substantial probability that reasonable jurors, upon receiving the judge's instructions in a case, may have concluded that they were precluded from considering any mitigating evidence unless they unanimously agreed it existed. McKoy v. North Carolina, 494 U.S. 433, 439 (1990); accord Mills v. Maryland, 486 U.S. 367, 384 (1988).

On post-conviction appeal, the Tennessee Court of Criminal Appeals refused to address the issue, erroneously stating that it was previously determined on direct appeal. 1996 WL 234075, at *6. The record shows that Petitioner did not raise any mitigating circumstance argument on direct appeal. Rather, on

direct appeal, the Tennessee Supreme Court merely noted that the jurors had been counseled on mitigating circumstances in accordance with Tennessee law. 774 S.W.2d at 917. This is a finding, not a conclusion of law.

Nonetheless, immediately after declining to address Petitioner's mitigating circumstances argument on post-conviction appeal, the Tennessee Court of Criminal Appeals, in the alternative, stated: "We also decline to disagree with our Supreme Court's repeated holdings that Tennessee's death penalty statutes are constitutional." 1996 WL 234075, at *6. In reaching its alternative holding, the Tennessee Court of Criminal Appeals relied, in part, on State v. Van Tran, 864 S.W.2d 465 (Tenn. 1993), which rejected the same unanimity argument that Petitioner raised on post-conviction. See id. at 481. Van Tran, in turn, relied upon State v. Thompson, 768 S.W.2d 239 (Tenn. 1989), which upheld Tennessee's death penalty statute as constitutional because it included none of the objectionable features of the jury instructions that the United States Supreme Court found in Mills v. Maryland. 864 S.W.2d at 481; Thompson, 768 S.W.2d at 250.

Thus, the Court is persuaded that the decision of the state courts neither contravened, nor unreasonably applied, clearly established federal law.[50]

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[50] Identical jury instructions were also reviewed by the Sixth Circuit Court of Appeals in Coe v. Bell, 161 F.3d 320 (6th Cir. 1998). That court concluded that Tennessee's jury instructions did not impermissibly imply that the jury must find mitigating circumstances unanimously because the language requires unanimity as to the results of the weighing, not the presence of a mitigating circumstance. Id. at 338. Petitioner erroneously conceded that this Court is constrained to apply governing precedent from the Sixth Circuit Court of Appeals on this issue, and the Court declines to do so. See Hinkle v. Randle, 271 F.3d

Accordingly, Respondent is entitled to summary judgment on this issue.

N. Part Fourteen - The Death Penalty Constitute Cruel and Unusual Punishment As a Result of the Length of Time Petitioner Has Been Incarcerated. (Docket Entry No. 53 ¶¶ 170-173)

In ¶¶ 170–173 of the amended habeas petition, Petitioner contends that the death penalty would be cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments given the length of time Petitioner has been incarcerated.

Respondent, on motion for summary judgment, complains that Petitioner raised this argument for the first time in his Motion to Re-Open Petition for Post-Conviction Relief, and because Petitioner's claim did not fall into the statutory exceptions for a motion to re-open pursuant to Tennessee Code § 40-30-217(a), Petitioner has procedurally defaulted this claim. Respondent also asserts that Petitioner fails to plead any facts to support a finding of cause and prejudice to overcome procedural default.

Because Petitioner's response merely attempts to re-litigate this claim and fails to address Respondent's summary judgment arguments, Petitioner has waived this claim. Nonetheless, the Court must examine

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239, 246 (6th Cir. 2001) ("Section 2254(d)(1) strictly limits the source of 'clearly established Federal law' to the holdings, as opposed to the dicta, of the Supreme Court's decisions. Accordingly, we 'no longer can look to lower federal court decisions in deciding whether the state decision is contrary to, or an unreasonable application of, clearly established federal law.'") (citations omitted). But see Gordon v. Kelly, No. 98-1905, 2000 WL 145144, at *5–*6 (6th Cir. Feb. 1, 2000) (noting that on habeas review pursuant to § 2254(d)(1), the Sixth Circuit has not consistently limited its citations solely to Supreme Court cases) (unpublished opinion).

Respondent's arguments to determine if the uncontroverted facts entitle Respondent to summary judgment as a matter of law.

Respondent correctly asserts that Petitioner did not raise this claim until his Motion to Re-Open. On appeal of the denial of that relief, the Tennessee Court of Criminal Appeals held that (1) Petitioner did not qualify for relief pursuant to Tennessee Code § 40-30-217(a)(1) on any ground, and (2) the sole authority Petitioner cited did not constitute an opinion of the United States Supreme Court. (Addendum No. 30, Order, Tennessee Court of Criminal Appeals, at 6).

Because the Tennessee Court of Criminal Appeals denied Petitioner's claim on an adequate and independent state law ground, Tennessee Code Annotated § 40-30-217(a)(1), Petitioner has procedurally defaulted this claim and is barred from presenting it to a federal habeas court unless he can show cause or prejudice, or a fundamental miscarriage of justice. Because Petitioner shows neither, Respondent is entitled to summary judgment on this claim.[51]

O. Part Fifteen - The Sentencing Jury Was Given False Information About Petitioner's Eligibility for Parole If He Were Sentenced to Life

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[51] The state court's alternate holding, that Petitioner did not raise a cognizable claim is a reasonable application of established United States Supreme Court precedent because the sole authority Petitioner cited in support of his cruel and unusual punishment argument, Lackey v. Texas, 514 U.S. 1045 (1995), is not an opinion of the Supreme Court. Rather, it is merely a memorandum on the denial of certiorari. A memorandum on the denial of certiorari does not constitute a ruling on the merits. United States v. Carver, 260 U.S. 482, 490 (1923).

Imprisonment. (Docket Entry No. 53 ¶¶ (174–177)

In ¶¶ 174–177 of the amended habeas petition, Petitioner alleges that the sentencing jury was given false information, which Petitioner was unable to correct,[52] about his eligibility for parole in the event he received a sentence of life imprisonment in violation of due process and the Sixth, Eighth, and Fourteenth Amendments.

Respondent's Motion for Summary Judgment counters that: (1) Petitioner's claim is procedurally defaulted because it relies upon the "falsity" of the information provided and Petitioner never previously asserted that the information was false; (2) Petitioner has procedurally defaulted all Eighth Amendment claims (portions of ¶¶ 174 and 177) for failing to raise such claims before the state courts; and (3) whatever remains of Petitioner's claims were properly determined according to established federal law by the state courts. Respondent further asserts that Petitioner pleads no facts to overcome procedural default.

In response, Petitioner alleges that he asserted violations of the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments in his Rule 11 Application to the Tennessee Supreme Court. (Petitioner's Resp. to Respondent's Statement of Material Facts in Support of Mot. for Summ. J., Docket Entry No. 94 at 13). Petitioner does not contest that in the state courts he never asserted that the statements made about sentencing were false. Id.

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[52] While Petitioner asserts that he was unable to correct this information, he does not explain why.

In order to preserve an issue for habeas review, a petitioner must have fairly presented both the factual and legal basis for his claim in the state courts. Jacobs v. Mohr, 265 F.3d 407, 415 (6th Cir. 2001); McMeans, 228 F.3d at 681.

The Court concludes that Petitioner has defaulted this claim by substantially altering it from what he presented before the state courts by incorporating a reliance on alleged false information. Petitioner did not incorporate any allegations of false information as part of his state law parole eligibility claim at any level of appeal to the state courts.

Because Petitioner failed to fairly present this claim to the state courts, Petitioner has procedurally defaulted it and this Court is precluded from reviewing his claim because Petitioner presents no showing of cause and prejudice to overcome his default.[53] Accordingly, Respondent is entitled to summary judgment on this claim.

P. Part Sixteen - As a Result of the Misleading Information Regarding Release As Well As Other Comments From the Prosecution, Petitioner Was Denied a Fair and Reliable Sentencing Hearing. (Docket Entry No. 53 ¶¶ 78–82)

In ¶¶ 78–82 of the amended habeas petition, Petitioner alleges that he was denied a fair and reliable capital sentencing hearing because the prosecutor engaged in unfair and highly prejudicial arguments about parole eligibility, the fear of the victims, and crime in the streets, in violation of the Sixth, Eighth, and Fourteenth Amendments.

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[53] The Court finds nothing remains of Petitioner's claim after procedural default and so declines to reach Respondent's third ground for summary judgment.

Respondent, on motion for summary judgment, contends that Petitioner procedurally defaulted any federal claims related to these remarks by the prosecutor because Petitioner raised his claims in state court without reference to federal constitutional violations or citations to cases discussing these issues in federal constitutional terms. Respondent further alleges that Petitioner fails to plead any facts that would support a finding of cause and prejudice to overcome this default.

Petitioner counters that he raised relevant federal constitutional rights in the state courts by arguing that the prosecutor's prejudicial comments denied Petitioner a fair trial. (Petitioner's Resp. to Respondent's Statement of Material Facts in Support of Mot. for Summ. J., Docket Entry No. 94 at 13). Petitioner argues that any procedural default is excused because of mandatory review of death sentences under Tennessee law.

The Court will address Petitioner's counter-arguments in turn.

1. Whether Petitioner raised relevant federal constitutional rights in the state courts

Respondent contends that Petitioner procedurally defaulted any federal claims related to the contested remarks made by the prosecutor during sentencing because Petitioner raised his claims in state court without properly referencing specific federal constitutional violations or case law. Petitioner argues that alleging he was denied a fair trial sufficiently raised a federal claim in the state courts.

To avoid procedural default of a federal claim in state court, a habeas petitioner must present his federal constitutional claim to the state court relying on a specific federal constitutional right, particular

constitutional provision, federal constitutional case, state case raising pertinent federal constitutional issue, or facts well within the mainstream of constitutional law. McMeans, 228 F.3d at 681. "General allegations of the denial of rights to a 'fair trial' and 'due process' do not 'fairly present' claims that specific constitutional rights were violated." Id.; accord Gray v. Netherland, 518 U.S. 152, 163 (1996).

On direct appeal, Petitioner argued that the prosecutor's comments in his closing argument that Petitioner would be eligible for parole after thirty-five years if sentenced to life imprisonment constituted improper bolstering. (Addendum No. 4, Appellant's Br., at 55–56). Petitioner further argued that the prosecutor's remarks about the fear of the victims and crime in the streets were improperly inflammatory. (Id. at 57–58). The only mention by Petitioner of a "fair trial" was raised in the heading for the claim:

> ISSUE EIGHT: DID THE STATEMENTS OF THE DISTRICT ATTORNEY GENERAL AND HIS ASSISTANT, IN CLOSING ARGUMENT, WHERE HE SAID:
>
> . . . .
>
> (3) THAT A PERSON GIVEN A LIFE SENTENCE WOULD BE ELIGIBLE FOR PAROLE AFTER SERVING THIRTY-FIVE (35) YEARS; AND
>
> (4) WHAT THE DECEASED FEARED AND THE EFFECT OF THE VERDICT ON THE GENERAL PUBLIC, CONSTITUTE SUCH IMPROPER CONDUCT AS TO DENY THE DEFENDANT, STEVE HENLEY, A FAIR TRIAL?

(Id. at 55, 57). In addition, Petitioner cited two only two state law cases in support of his argument,[54] neither of which cite to or rely on principles of federal constitutional law.

Because Petitioner's argument on this claim before the state courts did not rely on a specific federal constitutional right, particular constitutional provision, federal constitutional case, state case raising pertinent federal constitutional issue, or facts well within the mainstream of constitutional law, Petitioner did not fairly present a federal constitutional issue on this claim before the state courts. Federal courts do not have jurisdiction to consider habeas claims that were not fairly presented to the state courts. McMeans, 228 F.3d at 681; Mohr, 265 F.3d at 415. Accordingly, Respondent is entitled to summary judgment on this claim provided Petitioner cannot overcome this procedural default.

2. Whether Petitioner Overcomes Procedural Default

Petitioner maintains that any procedural default is excused because "[t]he statutory review required on direct appeal mandating review of any and all arbitrariness in the imposition of the death sentence necessarily included review of this claim as well. See n.27, supra." (Petitioner's Resp. in Opp'n to Mot. for Summ. J., Docket Entry No. 92 at 98, n.29).[55] This is

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[54] Russell v. State, 532 S.W.2d 268 (Tenn. 1976), and Bowling v. State, 458 S.W.2d 639 (Tenn. Crim. App. 1970).

[55] Petitioner raises this argument in a footnote (n.29) cross-referencing an earlier footnote (n. 27) that is unrelated to mandatory sentencing review. Footnote No. 27 addresses torture as an aggravating circumstance. The Court assumes Petitioner meant to cross-reference footnote No. 28, which addresses Tennessee's law mandating review of death sentences.

the identical excuse to procedural default that Petitioner raised in Part Twelve of his amended habeas petition, and the Court rejects it here for the same reasons. (See supra Part V(L)(2)(b)). Given that Petitioner cannot establish sufficient excuse to overcome his procedural default, Respondent is granted summary judgment on this claim.

Q. Part Seventeen - The Tennessee Death Penalty Statute Applied In This Case Was Unconstitutional. (Docket Entry No. 53 ¶¶ 183(a)–(f)

In ¶¶ 183(a)–(f) of the amended habeas petition, Petitioner alleges six grounds why the Tennessee Death Penalty Statute is unconstitutional in violation of the Sixth, Eighth, and Fourteenth Amendments.

In his Motion for Summary Judgment, Respondent contends that (1) Petitioner procedurally defaulted the allegations in ¶¶ 183(b) and 183(d) by not raising them before the Tennessee Supreme Court in his Rule 11 Application; (2) Petitioner raises no showing of cause and prejudice to overcome this default; and (3) to the extent that Petitioner has exhausted this claim, the decision of the state courts was neither contrary to nor an unreasonable application of, clearly established federal law as determined by the United States Supreme Court.

Because Petitioner fails to respond to Respondent's summary judgment arguments, Petitioner waives this claim. Nonetheless, the Court must examine Respondent's arguments to determine if the uncontroverted facts entitle Respondent to summary judgment as a matter of law. The Court will address Respondent's summary judgment arguments in turn.

1. Whether Petitioner procedurally defaulted the allegations in ¶ 183(b) and (d)

Respondent alleges in his summary judgment motion that Petitioner procedurally defaulted his allegations in ¶¶ 183(b) and (d) by failing to raise them in Petitioner's Rule 11 Application to the Tennessee Supreme Court.

The Court declines to address Respondent's argument about procedural default pursuant to failure to file a Rule 11 Application with the Tennessee Supreme Court for the reason discussed earlier. (See supra Part V(E)(2)(b)(3)).

2. Whether the decision of the state courts is neither contrary to, nor an unreasonable application of United States Supreme Court precedent.

Here Petitioner raises six challenges to the constitutionality of Tennessee's Death Penalty Statute as part of his allegation in a ¶ 183:

> a. The death penalty is imposed arbitrarily and capriciously;
>
> b. The prosecutor has unlimited discretion to seek the death penalty;
>
> c. The death penalty is imposed in a discriminatory manner, based upon economics and gender. For instance, it is disproportionately imposed upon poor males, and in counties such as Jackson, the death penalty is sought or imposed for offenses which would not merit a capital prosecution in other locales;
>
> d. The death-qualification process improperly skews the jury toward conviction and imposition of the death sentence;

e. Electrocution constitutes cruel and unusual punishment, and inflicts unnecessary and horrible torture and mutilation of the body, in violation of all contemporary standards of humanity or decency; and

f. The jury was told that it could only weigh mitigating evidence if it was "sufficiently substantial." Tr. 1486, 1487. This thereby limited the full consideration of mitigating evidence, in violation of the Eighth Amendment.

(Amended Pet. for Writ of Habeas Corpus, Docket Entry No. 53 at 45).

The record shows that all but two of Petitioner's death penalty statute challenges (183(a) and (f)) were raised before the Tennessee Court of Criminal Appeals on post-conviction appeal.[56] That court, citing three

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[56] While Petitioner appears to assert ¶ 183(a) as a separate Sixth Amendment challenge to Tennessee's death penalty statute in his amended habeas petition, he did not do so before the state courts. Petitioner's post-conviction appellate brief contains a heading that reads: "A. THE DEATH PENALTY IS IMPOSED CAPRICIOUSLY AND ARBITRARILY," after which he cites Gregg v. Georgia, 428 U.S. 153 (1976) as supporting case law for the proposition that sentencing procedures for death penalty cases must not be arbitrary and capricious. Immediately following this, he subdivided his argument into four issues: (1) unlimited prosecutorial discretion, (2) discriminatory application of the death penalty, (3) skewing of the jury toward conviction, and (4) jury instructions on life sentences. (Addendum No. 18, Br. of Appellant, at 78-79). Petitioner's post-conviction appellate brief never addressed the alleged arbitrary and capricious nature of Tennessee's death penalty statute as a free-standing challenge, but rather only enmeshed this allegation with his unlimited prosecutorial discretion challenge. (See id.) And in his Rule 11 Application, Petitioner likewise did not raise the alleged arbitrary and capricious nature of Tennessee's death penalty statute as a free-standing challenge, but rather only enmeshed this allegation

decisions of the Tennessee Supreme Court,[57] declined to hold Tennessee's death penalty statute unconstitutional on any ground Petitioner alleged. 1996 WL 234075, at *6.

The three Tennessee Supreme Court decisions upon which the Tennessee Court of Criminal Appeals relied, in turn, relied on United States Supreme Court precedent to reject only two of the challenges Petitioner raised 183(d) and 183(e). See State v. Howell, 868 S.W.2d 238, 258 (Tenn. 1993); State v. Van Tran, 864 S.W.2d 465, 481 (Tenn. 1993); State v. Black, 815 S.W.2d 166, 185–91 (Tenn. 1991). Given that these state court decisions neither contravened, nor unreasonably applied, United States Supreme Court precedent, Respondent is entitled to summary judgment on allegation No. 183(d) and 183(e).

The record shows that Petitioner raised allegation 183(f) for the first time in his Rule 11 Application to the Tennessee Supreme Court. In opposition to Petitioner's Rule 11 Application, Respondent failed to assert that Petitioner waived this claim by failing to present it at an earlier state court proceeding in accordance with Tennessee Code § 40-30-112. Rather, Respondent mistakenly argued that the Tennessee Court of Criminal Appeals had addressed all of Petitioner's challenges to Tennessee's Death Penalty

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with a discriminatory application of the death penalty argument. (Addendum No. 25, Appellant's Application for Permission to Appeal, at 19). Thus, the Court may not address the allegation in ¶ 183 (a) as a separate challenge to Tennessee's death penalty statute because Petitioner did not fairly present this challenge to the state courts as such. But it may address this allegation as a portion of his allegations in ¶¶ 183(b) and (c).

57 State v. Howell, 868 S.W.2d 238 (Tenn. 1993); State v. Van Tran, 864 S.W.2d 465 (Tenn. 1993); State v. Black, 815 S.W.2d 166 (Tenn. 1991).

Statute, finding them waived, previously determined, or contrary to prior rulings of the Tennessee Supreme Court. (Addendum No. 26, Answer in Opp'n to the Application for Permission to Appeal, at 7). The Tennessee Supreme Court denied Petitioner's Rule 11 Application without comment. (Addendum No. 27, Order of the Supreme Court of Tennessee). Thus, Petitioner's allegation in ¶ 183(f) was fairly presented to the state courts along with those portions of the death penalty statute claim that Petitioner raised earlier before the Tennessee Court of Criminal Appeals, *i.e.*, the allegations asserted in ¶¶ 183(b)–(e).

Accordingly, the Court now conducts an independent, but deferential, review of the portions of Petitioner's death penalty statute claim that were raised before, but unaddressed, by the state courts. The Court will address Petitioner's allegations in ¶¶ 183(b),(c), and (f) in turn.

a. Unlimited prosecutorial discretion (¶ 183(b))

On post-conviction appeal, Petitioner argued that the Tennessee Death Penalty Statute was unconstitutional because it arbitrarily and capriciously imposed unlimited discretion in the prosecutor as to whether or not to seek the death penalty.

The argument that a state's death penalty scheme is unconstitutional because it vests unlimited discretion in the prosecutor for selecting candidates for the death penalty was squarely rejected by the United States Supreme Court in Gregg v. Georgia, 428 U.S. 153, 199 (1976).

Thus, in failing to accept Petitioner's prosecutorial discretion claim, the state courts did not contravene, or unreasonably apply, Gregg. Respondent is entitled to summary judgment on this portion of Petitioner's

constitutional challenge to Tennessee's death penalty statute.

b. Economic and gender discrimination (¶ 183(c))

On post-conviction appeal, Petitioner argued that the Tennessee Death Penalty Statute imposed the death penalty in a discriminatory manner based on economics and gender because it is disproportionately imposed on poor males. (Addendum No. 18, Br. of Appellant, at 78–80). As support for this argument, Petitioner cited State v. Black, 815 S.W.2d 166, 191 (Tenn. 1991) (Reid, C.J., dissenting) ("Almost all persons sentenced to death are indigent."), and pointed to the fact that of the ninety-one persons on death row, only one was female and that males with first-degree murder convictions were five times more likely to receive a death sentence than females with the same conviction. (Addendum No. 18, Br. of Appellant, at 80).

Petitioner's economic and gender discrimination argument is based on broad generalizations, rather than on individualized proof of discrimination. In this sense, the Court finds that it is similar to the racial discrimination challenge based on a statistical study that was raised against Georgia's death penalty statute in McCleskey v. Kemp, 481 U.S. 279 (1987). McCleskey concluded that for a criminal defendant to prevail in a Fourteenth Amendment discrimination challenge to a death penalty statute, the defendant "must prove that the decisionmakers in his case acted with discriminatory purpose." Id. at 293 (emphasis in the original). McCleskey also concluded that statistics fail to establish arbitrary and capricious application of a death penalty statute in violation of the Eighth Amendment. Id. at 308, 312–13.

In the present case, the state courts neither contravened, nor unreasonably applied, McCleskey in

failing to accept Petitioner's statistical argument that the death penalty was applied in a discriminatory manner because more males than females are sentenced to death. Furthermore, Petitioner neither alleges, nor proves, that "the decisionmakers in his case acted with discriminatory purpose." Thus, the state courts neither contravened, nor unreasonably applied, McCleskey when they failed to accept Petitioner's Fourteenth Amendment, economic and gender discrimination claim. Accordingly, Respondent is entitled to summary judgment on ¶ 183(c).

4. Weighing of mitigating evidence (¶ 183(f))

In his Rule 11 Application, Petitioner complained that a jury instruction, which told the jury that they could only weigh "sufficiently substantial" mitigating evidence against the aggravating circumstances, impermissibly operated to preclude the jury from considering all mitigating evidence when deciding whether to impose a lesser sentence, in violation of his rights under the Eighth Amendment.

"The Eighth Amendment requires that the jury be able to consider and give effect to all relevant mitigating evidence offered by petitioner." Boyde v. California, 494 U.S. 370, 377–78 (1990); accord Blystone v. Pennsylvania, 494 U.S. 299, 305 (1990). In assessing the effect of a challenged jury instruction, the court may not judge the instruction in isolation, but must view it in the context of the overall charge to the jury. Boyde, 494 U.S. at 378.

The trial judge gave the jury the following sentencing instructions, in pertinent part,:

> You have now heard all the evidence to be presented in the trial and the sentencing hearing of this case, including all the evidence as to whether there were any

aggravated circumstances and whether there were any mitigating circumstances, all of which you will carefully weigh and consider. No death penalty shall be imposed unless you find unanimously that one or more of the following specified statutory aggravating circumstances has been proven on [sic] the trial, and or on [sic] the sentencing hearing, beyond a reasonable doubt.

. . . .

In arriving at the punishment, the jury shall consider as heretofore indicated, any mitigating circumstances, which include but are not limited to the following.

The defendant has no significant history of prior criminal activity.

You may also consider the testimony of the defendant's grandmother, Mrs. Bertha Henley, and the apparent affection or love that Mrs. Henley has for the defendant, and his apparent fondness for her.

The defendant's testimony of his involvement with his grandparents, and the broken marriage of the defendant, and his bad fortune in a farming operation that eventually wound up in bankruptcy.

If the jury unanimously determines that at least one statutory aggravating circumstance, or several statutory aggravating circumstances have been proven by the State beyond a reasonable doubt, and said circumstance or circumstances are not outweighed by any

sufficiently substantial mitigating circumstances, the sentence shall be death.

If the death penalty is the decision of the jury, the members of the jury then complete the attached form entitled, punishment of death. The jury must include and reduce to writing the specific statutory aggravating circumstance or aggravating circumstances so found.

Further, the jury must include in its finding that there were no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances, so found.

Upon such unanimous finding, each member of the jury shall affix his or her signature to the said written finding, and then return said written verdict to the Court.

If the jury unanimously determines that no statutory aggravating circumstance or aggravating circumstances have been proved by the State beyond a reasonable doubt, or if the jury unanimously determines that a statutory aggravating circumstance or aggravated circumstances have been proven by the State beyond a reasonable doubt, but that said circumstance or circumstances are outweighed by one or more mitigating circumstance, the punishment shall be life imprisonment.

. . . .

You will be provided with two punishment forms. One entitled, punishment of life imprisonment, and the

> other entitled, punishment of death. You will complete the appropriate punishment form and each will sign it. The other punishment is to be left incomplete and unsigned. These punishment forms read as follows:
>
> Punishment of death: We, the Jury, unanimously find the following listed statutory aggravating circumstance or circumstances. From the limited list provided by the Court in these instructions, the jury must write and specifically list below, as a part of it's [sic] signed verdict, the particular statutory aggravating circumstance or circumstances found by the jury.
>
> Secondly, we, the Jury, unanimously find that there are no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so listed above.

(Addendum No. 3, Vol. 10, Trial Tr., at 1485–89).

The above jury instructions mentioned sufficiently substantial mitigating circumstances only twice out of six specific references to mitigating circumstances. In addition, the Court enumerated all of the mitigating circumstances presented at trial and instructed the jury that if the aggravated circumstance or circumstances was outweighed by one or more mitigating circumstances, the punishment would be life imprisonment. And Petitioner does not allege, nor does the record show, that these instructions excluded any of the mitigating circumstances presented at trial. In this context, there is no Eighth Amendment violation in the jury instructions pursuant to Boyde.

Thus, the state courts neither contravened, nor unreasonably applied, Boyde in failing to accept Petitioner's Eighth Amendment mitigating evidence portion of this claim. Accordingly, Respondent is entitled to summary judgment on Petitioner's allegation in ¶ 183(f).

R. Part Eighteen - Jurors Who Expressed Misgivings About Imposing the Death Penalty Were Improperly Excluded From Serving on the Jury. (Docket Entry No. 53 ¶¶ 184–190)

In ¶¶ 184–190 of the amended habeas petition, Petitioner alleges that the trial court improperly excluded jurors who expressed misgivings about the death penalty, but were otherwise capable of serving on the jury, and did so without providing the opportunity for rehabilitation in violation of the Sixth, Eighth, and Fourteenth Amendments.

Respondent contests both the scope and the substance of Petitioner's claim in his summary judgment motion.

Because Petitioner does not challenge the factual findings of the state courts or allege that the state courts improperly applied clearly established federal law to his case, he has waived this claim for summary judgment consideration. Nevertheless, the Court must review this claim to determine whether Respondent is entitled to summary judgment as a matter of law.

The Court will first address the scope of Petitioner's juror exclusion claim and then its substance.

1. Scope of Petitioner's juror exclusion claim

Regarding the scope of Petitioner's juror exclusion claim, Respondent alleges that (1) although Petitioner raised a claim on post-conviction regarding the removal of jurors who expressed "conscientious scruples" about

the death penalty, the issue was raised only in the context of a "religious or political test" in violation of the Sixth and Fourteenth Amendments; (2) Petitioner's attempt to expand the issue beyond a religious or political test, or to add an Eighth Amendment claim, is barred by procedural default because Petitioner did not exhaust this portion of his claim before the state courts; and (3) because Petitioner only mentioned lack of rehabilitation in passing in his post-conviction appeal but not in his Rule 11 Application, he did not preserve the rehabilitation issue for habeas review.

Citing his post-conviction appellate brief, Petitioner retorts that: (1) the Sixth and Fourteenth Amendment aspects of his claim were separate from his "religious or political test" allegation, which was raised under state law, and he cited controlling United States Supreme Court authority in support of his claims; and (2) he raised rehabilitation properly. (Petitioner's Resp. to Respondent's Statement of Material Facts In Support of Mot. for Summ. J., Docket Entry No. 94 at 14). Petitioner acknowledges that he did not address rehabilitation in his Rule 11 Application and does not contest that he failed to raise the Eighth Amendment in any state court.

A non-moving party may not rest upon the mere denial of the moving party's pleading to preclude a motion for summary judgment but "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). By citing to his post-conviction appellate brief, Petitioner has raised a factual question that precludes the Court from granting Respondent summary judgment that Petitioner's juror exclusion claim (1) did not address rehabilitation and (2) is limited to a religious or political test.

However, because Petitioner does not contest that he failed to raise the Eighth Amendment in his juror exclusion claim before the state courts, Petitioner waives this aspect of Respondent's summary judgment argument about the scope of his juror exclusion claim. Nonetheless, the Court is compelled to verify that Respondent is entitled to summary judgment on this aspect of Petitioner's claim.

The record shows that Petitioner cited the Eighth Amendment when raising the juror exclusion claim in his Amended Petition for Post-Conviction Relief. (Addendum No. 13, at 2–3). However, Petitioner failed to raise an Eighth Amendment argument, or cite any case law raising the Eighth Amendment when he raised his juror exclusion claim in either his post-conviction appellate brief or his Rule 11 appellate brief. (Addendum No. 18, at 70–71; Addendum No. 19, at 47). He abandoned this aspect of his juror exclusion claim by not raising the Eighth Amendment in his post-conviction appellate brief or his Rule 11 application brief before the state courts. Louisville & N.R. Co. v. Conasauga River Lumber Co., 153 S.W.2d 143, 147 (Tenn. Ct. App. 1941) (complaint not addressed in brief is waived) (civil case); Malone v. State, No. 307, 1989 WL 148133, at *1 n.1 (Tenn. Crim. App. Dec. 6, 1989) (same (unpublished opinion). Accordingly, Respondent's summary judgment motion to narrow this claim to exclude the Eighth Amendment is granted.

For reasons presented elsewhere in this memorandum (see supra Part V(E)(2)(b)(3)), the Court will not address whether Petitioner's failure to include his juror exclusion claim in his Rule 11 Application did not preserve the issue for habeas review. Thus, assuming without deciding that the rehabilitation issue

was preserved, Petitioner's claim remains as he raises it in his amended habeas petition.

2. Substance of Petitioner's juror exclusion claim

Respondent submits that the Tennessee Court of Criminal Appeals determined that Petitioner had waived this issue by failing to raise it on direct appeal. Alternatively, Respondent alleges that the state courts denied Petitioner's juror exclusion claim on the merits and that the decision of the state courts was neither contrary to, nor an unreasonable application of, clearly established federal law as determined by the United States Supreme Court and was based on a reasonable determination of the facts given the evidence in the record at the time. The Court will examine each of Respondent's summary judgment arguments in turn.

a. Waiver of claim

Respondent alleges that Petitioner waived his juror exclusion claim in the state courts by not first raising it on direct appeal, but rather on post-conviction.

Petitioner does not contest Respondent's argument.

The record confirms Respondent's assertion that Petitioner first raised his juror exclusion claim in his amended petition for post-conviction relief. (Addendum No. 13, at 3). On post-conviction appeal, the Tennessee Court of Criminal Appeals stated:

"The petitioner claims he was denied his constitutional right to trial by jury because of the trial court's dismissal of jurors opposed to the death penalty. Because this issue was not raised on direct appeal, it is waived." 1996 WL 234075, at *6. That court cited Tennessee Rule of Appellate Procedure 36 in support of its holding and then alternatively denied Petitioner's claim on the merits. Id. Because Petitioner does not challenge the state court's findings

of fact as erroneous, the Court must give them statutory deference on habeas review.

Because the Tennessee Court of Criminal Appeals denied Petitioner's juror exclusion claim on an adequate and independent state law ground, i.e., waiver, Petitioner has procedurally defaulted this claim, and it is barred from federal habeas review, absent a showing of cause or prejudice, or a fundamental miscarriage of justice.

Nevertheless, although Respondent noted that the Tennessee Court of Criminal Appeals concluded that Petitioner had waived his juror exclusion claim, Respondent did not assert that Petitioner procedurally defaulted this claim and that Petitioner is therefore barred from raising the juror exclusion claim before this Court. Nor did Respondent assert that Petitioner failed to overcome this default by showing cause and prejudice or a fundamental miscarriage of justice.

Because state-court procedural default is an affirmative defense, Respondent must plead and prove the default or lose the right to assert the defense thereafter. Gray, 518 U.S. at 165–66. Here, Respondent proved state-court procedural default but failed to plead it. By not properly raising this affirmative defense, Respondent has waived it. Thus, Respondent is not entitled to summary judgment for Petitioner's juror exclusion claim on procedural default grounds.

b. Whether the decision of the state court was contrary to, or an unreasonable application of, United States Supreme Court precedent

Respondent alleges that the decision of the state courts on Petitioner's juror exclusion claim was neither contrary to, nor an unreasonable application of clearly

established federal law as determined by United States Supreme Court.

In Morgan v. Illinois, the United State Supreme Court concluded that "a juror who in no case would vote for capital punishment, regardless of his or her instructions, is not an impartial juror and must be removed for cause." 504 U.S. 719, 728 (1992).

On post-conviction appeal, Petitioner raised the following argument for his juror exclusion claim:

> Under the Sixth and Fourteenth Amendments to the United States Constitutional and the Constitution of Tennessee, Article I, Section 6, an accused is entitled to a jury trial by a fair and impartial jury. The Tennessee constitutional provision provides, in part, that: "no religious or political test shall ever be required as qualification for jurors." In the instant case, at least 30 or 31 jurors were excluded because of conscientious scruples about the death penalty after bing questioned only by the Judge. There were no rehabilitation attempts by counsel for defendant. And on at least 7 of these prospective jurors, the question of religion was presented.
>
> It is difficult to imagine that none of those jurors were eligible to serve on this jury. See, Gray v. Mississippi, 481 U.S. 648, 107 S.Ct. 2045, 90 L.Ed.2d 622 (1987). It is submitted that the disqualification of these jurors in this proceeding, without even the attempt of rehabilitation by defense counsel, not only constituted ineffective assistance of

> counsel, but also denied Steve Henley of his constitutional right to a trial by jury.

(Addendum No. 18, Br. of Appellant, 70–71) (footnote listing excluded jurors omitted).[58]

Relying on Morgan and State v. Harris, 839 S.W.2d 54 (Tenn. 1992), a state case applying the Sixth and Fourteenth Amendments to a juror exclusion claim, the Tennessee Court of Criminal Appeals addressed Petitioner's juror exclusion claim on the merits, holding that it was proper for the trial court to excuse jurors who indicated that they would not vote for the death penalty regardless of jury instructions and that Petitioner did not meet the burden of proving by convincing evidence that the trial court's determination was erroneous. 1996 WL 234075, at *6.

Because Petitioner does not challenge the factual findings of the state courts, the Court must give those findings deference. Given those findings, the Court is persuaded that the decision of the Tennessee Court of Criminal Appeals was neither contrary to, nor an unreasonable application of, Morgan. Accordingly, Respondent is entitled to summary judgment on Petitioner's juror exclusion claim.

S. Part Nineteen - Petitioner's Death Sentence is Disproportionate and Arbitrary. (Docket Entry No. 53 ¶¶ 191–192)

In ¶¶ 191 and 192 of the amended habeas petition, Petitioner complains about the gross disparity in sentencing between Petitioner's two death sentences and his co-defendant's two concurrent twenty-five year

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[58] Gray applied the Sixth and Fourteenth Amendments to conclude that in a capital prosecution, exclusion of a juror for cause, who was not irrevocably committed to vote against the death penalty regardless of the facts, constituted reversible constitutional error. 481 U.S. at 659.

sentences under which his co-defendant was released in barely five years. Petitioner asserts that this sentencing disparity is disproportionate and arbitrary under the Eighth and Fourteenth Amendments.

Respondent's summary judgment motion contends that Petitioner's claim is not cognizable pursuant to § 2254 because proportionality of sentencing is a state statutory issue, not a federal constitutional right. Respondent further contends that to the extent Petitioner is asserting that the sentencing is arbitrary, Petitioner has procedurally defaulted that aspect of the claim because Petitioner failed to present such a claim to the state courts.

Petitioner complains that it is "unclear what Respondent's contention is." (Petitioner's Resp. to Respondent's Statement of Material Facts In Support of Mot. for Summ. J., Docket Entry No. 94 at 15). Yet, in response to Respondent's summary judgment motion, Petitioner acknowledges that as a general matter, the Eighth Amendment does not require proportionality review, but because the Tennessee Supreme Court was required to conduct a proportionality review, Petitioner held a due process liberty interest against being executed in any circumstance in which the sentence is disproportionate. Petitioner does not contest Respondent's contention that Petitioner failed to assert that Petitioner's sentencing was arbitrary before the state courts.

The Court will address Respondent's procedural default argument first because it will determine the scope of the claim. Then the Court will address whether Petitioner's claim is non-cognizable.

1. Arbitrariness

Respondent contends Petitioner has procedurally defaulted arbitrariness from this claim because

Petitioner failed to present any arguments on arbitrariness to the state courts. Petitioner does not contest Respondent's assertion. Accordingly, Petitioner waives Respondent's summary judgment argument. Nonetheless, the Court must still examine the record to ensure that Respondent is entitled to summary judgment on this portion of his claim as a matter of law.

The record confirms Respondent's assertion that Petitioner did not raise arbitrariness before the state courts. Moreover, Petitioner failed to establish excuse to overcome this default. Thus, Respondent is entitled to summary judgment in excluding arbitrariness from this portion of Petitioner's claim.

2. Whether the disproportionate death sentence claim is non-cognizable

Respondent argues that Petitioner's disproportionate sentencing claim is non-cognizable because it involves no federal constitutional issue. Petitioner complains that Respondent's argument is unclear but then asserts a due process liberty interest against being executed in any circumstance in which the sentence is disproportionate stemming from Tennessee's mandatory proportionality sentencing review.

The non-moving party may not rest upon mere denials or allegations in opposing a summary judgement argument; rather, the non-moving party must set forth specific facts showing that there is a genuine dispute of material fact. Fed. R. Civ. Pro. 56(e).

Petitioner's comment that Respondent's contention is unclear does not meet the requirement of Rule 56(e) of the Federal Rules of Civil Procedure for precluding a Court from granting a movant summary judgment.

Moreover, Petitioner's rebuttal argument indicates that Petitioner understood Respondent's summary judgment argument.

A federal habeas court does not sit as a "super" state supreme court to review whether the state courts erred in applying state law; rather, the function of federal habeas review is to determine whether a violation rises to the level of a constitutional wrong. Wilson v. McMacken, 786 F.2d 216, 221 (6th Cir. 1986); see also Pulley v. Harris, 465 U.S. 37, 41 (1984) ("[A] federal court may not issue the writ [of habeas corpus] on the basis of a perceived error of state law."). Proportionality review of a death sentence by a state appellate court is not required by established federal constitution law. See Pulley, 465 U.S. at 44–45, 50.

Respondent correctly asserts that Petitioner's disproportionality claim is non-cognizable. Accordingly, Respondent is entitled to summary judgment on this claim.[59]

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[59] The Court further notes that Petitioner cites no case law in support of the due process liberty interest assertion he raises here. A skeletal argument, really nothing more than an assertion, does not preserve a claim. Dunkel, 927 F.2d at 956, cited in United States v. Gregory, No. 96-1181, 1997 WL 615761, at *3 (6th Cir. 1997) (unpublished opinion); accord McPherson v. Kelsey, 125 F.3d 989, 995–96 (6th Cir. 1997). Not only does Petitioner raise a skeletal argument, but he also violates Local Rule 8(c)(7)(c), which requires counsel to provide citations of authority to support the proposition of law on which counsel relies.

Furthermore, the record shows that before the state courts Petitioner did not (1) raise a due process liberty interest argument, or (2) cite to any specific federal constitutional right or provision, federal constitutional case law, or state case law raising a pertinent federal constitutional issue, or raise facts well within the mainstream of federal constitutional law. (See Addendum No. 4, Appellant's Br., at 38–40; Addendum No. 13, Amended Pet. for Post Conviction Relief, at 6). In allegation No. 15(n) of the

T. Part Twenty - The Jury Was Erroneously Instructed About the Effect of a Non-Unanimous Verdict. (Docket Entry No. 53 ¶¶ 193–194)

In ¶¶ 193–194 of his amended petition, Petitioner asserts that his rights to a fair and non-arbitrary capital sentencing proceeding pursuant to the Eighth and Fourteenth Amendments were violated by the jury not being instructed on the meaning or the effect of a non-unanimous verdict.

Respondent's Motion for Summary Judgment maintains that on direct appeal Petitioner raised a challenge to the form of the verdict only as an alleged violation of the state statutory requirement for the form of the findings. Respondent further maintains that Petitioner's direct appeal made no reference to the Fourteenth Amendment and cited no federal authority to alert the state court that Petitioner was asserting a federal constitutional violation, thereby procedurally defaulting this claim. Finally, Respondent asserts that Petitioner has failed to plead any facts to overcome this default.

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amended post-conviction petition, Petitioner challenged the 'proportionality and arbitrariness' of his sentence by the Tennessee Supreme Court as 'inadequate and deficient' under state law only. Accordingly, Petitioner failed to fairly present any federal constitutional issue relevant to this claim before the state courts.

Because Petitioner failed to fairly present any federal constitutional issue in this claim to the state courts, he has procedurally defaulted this claim and is barred from raising it before this Court absent a showing of cause and prejudice or a fundamental miscarriage of justice. Despite Respondent's failure to assert Petitioner's failure to show excuse to overcome this procedural default, Respondent is entitled to summary judgment on this claim because of the Court's main holding that Petitioner raises a non-cognizable claim.

Petitioner concedes that the United State Supreme Court denied such a claim in Jones v. United States, 527 U.S. 373 (1999), and merely raises the claim in the event that the United States Supreme Court might one day change its mind. Petitioner further contends that in violation of the due process clause of the Fourteenth Amendment, the jury failed to specify the degree of murder of which it was convicting Petitioner, which thereby precludes a finding that Petitioner is guilty of first-degree murder.[60]

Petitioner disputes Respondent's contention that Petitioner challenged the form of the verdict only as a violation of state statute on direct appeal, maintaining: "It appears that this particular claim was not raised on direct appeal." (Petitioner's Resp. to Respondent's Statement of Material Facts In Support of Mot. for Summ. J., Docket Entry No. 94 at 15). However, Petitioner does not assert that he raised the claim before the state courts elsewhere.

Petitioner has set forth no specific facts, as required under Federal Rule of Civil Procedure 56, to rebut Respondent's contention that Petitioner challenged the form of the verdict only as a violation of state statute on direct appeal; Petitioner merely denies this contention. Moreover, the record confirms Respondent's contention. (Addendum No. 4, Appellant's Br., at 19–22).

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[60] Petitioner's Response in Opposition to Motion for Summary Judgment severs the allegation in ¶ 194 from this claim and asserts it as an entirely separate claim. Because this is an improper attempt to amend the pleadings after a responsive pleading without leave of the Court or Respondent's written consent, the Court will not address the allegation in ¶ 194 as a free-standing claim.

Respondent is entitled to summary judgment because Petitioner procedurally defaulted this claim by not exhausting it before the state courts and provides no excuse to overcome his default.

U. Part Twenty-One - The Evidence Is Insufficient to Support the Aggravated Arson Conviction. (Docket Entry No. 53 ¶¶ 195–198)

In ¶¶ 195–198 of the amended habeas petition, Petitioner maintains that the evidence is insufficient to support the aggravated arson conviction in violation of the Fourteenth Amendment. Specifically, in ¶ 197 Petitioner contends that, while there was proof of a burning, there was insufficient proof of a criminal agency causing the burning.

Respondent counters that on direct appeal, the Tennessee Supreme Court properly applied Jackson v. Virginia to find that there was abundant evidence to establish the crime of aggravated arson. Respondent submits that the decision of the Tennessee Supreme Court was neither contrary to, nor an unreasonable application of, Jackson v. Virginia and that it was based on a reasonable determination of the facts in light of the evidence contained in the trial record.

Petitioner waives this claim because instead of responding to Respondent's summary judgment argument, Petitioner merely attempts to re-litigate this claim. Nonetheless, the Court must examine Respondent's arguments to determine if the uncontroverted facts entitle Respondent to summary judgment as a matter of law. Because Petitioner does not challenge the state court findings of fact as erroneous, the Court must give them statutory deference on habeas review.

The Tennessee Supreme Court addressed the sufficiency of the evidence for murder and arson

together because one of the victims died of smoke inhalation and burns. Thus, that court's findings on the sufficiency of the evidence for arson were presented earlier in this Memorandum when the Court addressed Petitioner's sufficiency of the evidence for first-degree murder claim. (See supra Part V(A)). Applying Jackson v. Virginia and state evidentiary law to those findings, the Tennessee Supreme Court concluded that there was ample evidence to establish Petitioner's guilt for arson. 774 S.W.2d at 914.

Because the Court is persuaded that the decision of the state courts was neither contrary to, nor an unreasonable application of Jackson v. Virginia, Respondent is entitled to summary judgment on this claim.

V. Part Twenty-Two - The Cumulative Effect of All the Errors at the Guilt and Sentencing Phase of Petitioner's Trial Denied Him a Fair Trial and Sentencing Hearing.(Docket Entry No. 53 ¶ 199)

In ¶ 199 of the amended habeas petition, Petitioner alleges that the cumulative effect of all errors at the guilt phase of his trial violated his right to a fair trial and to due process under the Fourteenth Amendment, and the cumulative effect of all errors at the sentencing phase of his trial denied him a fair and non-arbitrary sentencing hearing in violation of the Eighth and Fourteenth Amendments. Petitioner cites Walker v. Engle, 703 F.2d 959 (6th Cir. 1983) and Lundy v. Campbell, 888 F.2d 467 (6th Cir. 1989) in support of his cumulative error argument.

Respondent counters that: (1) to the extent that this issue attempts to rely on claims that have been procedurally defaulted, Petitioner has likewise procedurally defaulted this claim and is therefore barred from obtaining relief; (2) because this issue was raised on post-conviction solely as a violation of the

Fourteenth Amendment, that portion based on the Eighth Amendment has been procedurally defaulted; (3) Petitioner fails to plead any facts to overcome these defaults; (4) to the extent this claim relies on non-cognizable claims, this claim is likewise non-cognizable; and (5) to the extent that this claim is based on claims that were properly exhausted before the state courts alleging federal constitutional violations, Respondent asserts that Petitioner's cumulative claim fails because the underlying claims asserted in its support lack merit.

"The Supreme Court has not held that distinct constitutional claims can be cumulated to grant habeas relief." Lorraine v. Coyle, 291 F.3d 416, 447 (6th Cir. 2002). Pre-AEDPA case law applying cumulative error analysis, such as Walker and Lundy, do not apply to cases governed by the AEDPA. See id.

Since this case is governed by the AEDPA, Petitoner's cumulative error claim is not a viable constitutional claim. Accordingly, Respondent is entitled to summary judgment on Petitioner's cumulative error claim.

VI. PETITIONER'S REQUEST FOR DISCOVERY AND AN EVIDENTIARY HEARING

The amended habeas petition concludes with a request for additional discovery and an evidentiary hearing.

Respondent's Motion for Summary Judgment argues that these requests should be denied because Petitioner fails to plead any facts justifying either discovery or an evidentiary hearing.

Petitioner once again fails to respond to Respondent's arguments, thereby waiving this request. Nonetheless, the Court must examine Respondent's

arguments to determine if the uncontroverted facts entitle Respondent to summary judgment as a matter of law.

The Court will address each request in turn.

A. The Discovery Request

Respondent maintains that Petitioner's request for discovery should be denied because Petitioner fails to plead any facts supporting the discovery request.

Rule 6 of the Rules Governing Section 2254 Cases in the United States District Courts provides that discovery is to be granted only "for good cause shown" and that requests for discovery must be "accompanied by a statement of the interrogatories or requests for admission and a list of the documents, if any, sought to be produced."

The amended habeas petition concludes by asking the Court to "grant Petitioner any requested additional discovery necessary for the full investigation and presentation of his claims."

Not only does this request fail to establish good cause, Petitioner failed to attach "a statement of the interrogatories or requests for admission and a list of the documents, if any, sought to be produced" as required by Rule 6. Accordingly, Respondent is entitled to summary judgment on Petitioner's discovery request.

B. The Evidentiary Hearing Request

Respondent contends that because Petitioner fails to plead any facts justifying an evidentiary hearing, this request should be denied.

Section 2254(e)(2) provides:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an

> evidentiary hearing on the claim unless the applicant shows that –
>
> (A) the claim relies on –
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Petitioner concludes his amended habeas petition by asking the Court to "grant Petitioner an evidentiary hearing at which he can establish his entitlement to habeas corpus relief." Because Petitioner failed to plead any of the grounds required by § 2254(e)(2) for an evidentiary hearing in a habeas court, Respondent is entitled to summary judgment on Petitioner's evidentiary hearing request.

Accordingly, the Court denies Petitioner's request for discovery and an evidentiary hearing.

VII. CONCLUSION

For the aforementioned reasons, the Court will GRANT Respondent's Motion for Summary Judgment and DENY Petitioner's request for discovery and an evidentiary hearing. Accordingly, this action will be dismissed with prejudice.

An appropriate Order will be entered.

/s/ Robert L. Echols
ROBERT L. ECHOLS
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STEVE HENLEY, Petitioner-Appellant,

v.

RICKY BELL, WARDEN, RIVERBEND MAXIMUM SECURITY INSTITUTION, Respondent-Appellee.

No. 03-5891.

2007 U.S. App. LEXIS 25163

JUDGES: Before SILER, COOK, and COLE, Circuit Judges.

OPINION

ORDER

BEFORE: SILER, COLE, and COOK, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original

submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART VI. PARTICULAR PROCEEDINGS
CHAPTER 153. HABEAS CORPUS

28 U.S.C. § 2254

§ 2254. State custody; remedies in Federal courts

* * *

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

* * *